No. 97-372-CFX Title: United States, Petitioner
v.
United States Shoe Corporation

Docketed: September 3, 1997 Court: United States Court of Appeals for the Federal Circuit

Entry	Date	Proceedings and Orders
	Aug 29 1997	Petition for writ of certiorari filed. (Response due October 3, 1997)
	Sep 15 1997	Waiver of right of respondents General Chemical, et al. to respond filed.
	Oct 3 1997	Brief of respondent United States Shoe Corporation in opposition filed.
	Oct 15 1997	DISTRIBUTED. October 31, 1997
	Oct 15 1997	Reply brief of petitioner United States filed.
	Oct 31 1997	Petition GRANTED. SET FOR ARGUMENT March 4, 1998. **********
	Dec 15 1997	Joint appendix filed.
	Dec 15 1997	Brief of petitioner United States filed.
	Dec 15 1997	Brief amicus curiae of Oregon filed.
	Dec 15 1997	Motion of Arctic Cat, et al. for leave to file a brief as amici curiae filed.
	Dec 22 1997	CIRCULATED.
	Dec 30 1997	Record filed.
	Jan 12 1998	Motion of Arctic Cat, et al. for leave to file a brief as amici curiae GRANTED.
	Jan 13 1998	Brief amici curiae of Boise Cascade, et al. filed.
	Jan 14 1998	Brief amicus curiae of National Industrial Transportation League filed.
	Jan 15 1998	Brief of respondent United States Shoe Corporation filed.
	Jan 15 1998	Brief amici curiae of Addison Wesley Longman, et al. filed.
	Jan 15 1998	Brief amici curiae of Aluminum Company of America, et al. filed.
	Jan 15 1998	Brief amici curiae of New Holland North American Inc., et al. filed.
	Jan 15 1998	Brief amici curiae of Texaco Refining and Marketing, Inc., et al. filed.
	Jan 15 1998	Brief amici curiae of Totes-Isotoner Corporation, et al. filed.
	Jan 15 1998	Brief amici curiae of Cobe Laboratories, Inc., et al. filed.
	Jan 15 1998	Brief amicus curiae of Amoco Chemical Company filed.
	Jan 15 1998	Brief amicus curiae of General Chemical Corp., et al. filed.
	Jan 15 1998	Brief amici curiae of Baxter Healthcare Corporation, et al. filed.
	Jan 20 1998	Record filed.
	Jan 26 1998	Motion of Arctic Cat, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument filed.
	Jan 30 1998	Opposition of United States Shoe Corporation to motion of Arctic Cat, et al. for leave to participate in oral argu filed.
	Feb 18 1998	Reply brief of petitioner United States filed.

2 pp

No. 97-372-CFX

Entry	Date	Proceedings and Orders
	Feb 18 1998	Reply to respondent's opposition to motion of Arctic Cat, Inc., et al. for leave to participate in oral argument.
	Feb 23 1998	Motion of Arctic Cat, et al. for leave to participate in oral argument as amici curiae, for divided argument and for additional time for oral argument DENIED.
	Mar 4 1998	ARGUED.

OCT 31 1997

No. 97-372

In the Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES SHOE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether application of the Harbor Maintenance Tax (26 U.S.C. 4461(a)) to goods loaded at ports of the United States for export shipment violates the Export Clause of the Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No.

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES SHOE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The decision of the court of appeals (App., *infra*, 1a-45a) is reported at 114 F.3d 1564. The decision of the United States Court of International Trade (App., *infra*, 46a-89a) is reported at 907 F. Supp. 408.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 9, Clause 5 of the Constitution of the United States provides:

> No Tax or Duty shall be laid on Articles exported from any State.

2. 26 U.S.C. 4461 provides:

(a) General rule.—There is hereby imposed a tax on any port use.

(b) Amount of tax.—The amount of the tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.

(c) Liability and time of imposition of tax.—

(1) Liability.—The tax imposed by subsection (a) shall be paid by —

(A) in the case of cargo entering the United States, the importer,

(B) in the case of cargo to be exported from the United States, the exporter, or

(C) in any other case, the shipper.

(2) Time of imposition.—Except as provided by regulations, the tax imposed by subsection (a) shall be imposed—

(A) in the case of cargo to be exported from the United States, at the time of loading, and

(B) in any other case, at the time of unloading.

3. 26 U.S.C. 4462 provides, in relevant part:

(a) Definitions.—For purposes of this subchapter—

(1) Port Use.—The term "port use" means —

(A) the loading of commercial cargo on, or

(B) the unloading of commercial cargo from, a commercial vessel at a port.

(2) Port.—

(A) In general.—The term "port" means any channel or harbor (or component thereof) in the United States, which—

(i) is not an inland waterway, and

(ii) is open to public navigation.

* * * * *

(3) Commercial cargo.—

(A) In general.—The term "commercial cargo" means any cargo transported on a commercial vessel, including passengers transported for compensation or hire.

(B) Certain items not included.—The term "commercial cargo" does not include—

(i) bunker fuel, ship's stores, sea stores, or the legitimate equipment necessary to the operation of a vessel, or

(ii) fish or other aquatic animal life caught and not previously landed on shore.

* * * * *

STATEMENT

Approximately 4000 cases have been filed in the United States Court of International Trade to challenge the constitutionality of the Harbor Maintenance Tax, 26 U.S.C. 4461. Approximately 90 similar challenges to the tax are pending in the Court of Federal Claims. The present case was selected by the Court of International Trade as a test case for this litigation. The other similar suits have been held in abeyance pending the final disposition of this case.

1. a. The Harbor Maintenance Tax imposes a port use charge of 0.125 percent of the value of any commercial cargo that is loaded or unloaded from a commercial vessel in any port of the United States. 26 U.S.C. 4461(a). The tax applies without differentiation as to the origin or destination of the cargo. The incidence of the tax is simply upon "any port use" (26 U.S.C. 4461(b).

The Harbor Maintenance Tax was enacted as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082. That Act was enacted by Congress to provide funds for the necessary costs of maintaining and expanding channel and harbor facilities by "impos[ing] Federal user fees or

charges on the beneficiaries of these expenditures." S. Rep. No. 228, 99th Cong., 1st Sess. 5 (1986). Because the United States "has an obvious interest in making those who specifically benefit from its services pay the cost" (*Massachusetts* v. *United States*, 435 U.S. 444, 462 (1978)), Congress determined to impose a nationally-uniform fee on the "value of the cargo passing" through harbors (S. Rep. No. 126, 99th Cong., 2d Sess. 9 (1985)). The Senate Report on the Act explains that (S. Rep. No. 228, *supra*, at 5-6):

> [T]he ad valorem basis of the charges is the only acceptable basis on which to impose such charges. This national, uniform basis minimizes any possible competitive disadvantage among cargo types and U.S. ports which otherwise might result from user charges.

The Harbor Maintenance Tax is collected from the importer, exporter or other shipper whose cargo is loaded or unloaded in a port of the United States. 26 U.S.C. 4461(c)(1), (2). The charges thus collected are deposited in the Harbor Maintenance Trust Fund (26 U.S.C. 9505)) and "may only be expended for harbor operations and maintenance" costs incurred on the shippers' behalf (App., *infra*, 45a (Mayer, J., dissenting)). See 26 U.S.C. 9505(c).[1] In enacting this

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[1] The Harbor Maintenance Tax was originally established at 0.040 percent of value. Pub. L. No. 99-662, § 4461, 100 Stat. 4266. In the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11214, 104 Stat. 1388-436, it was increased to its current level of 0.125 percent. Before the rate of this port use charge was increased, the Harbor Maintenance Trust Fund provided approximately 40 percent of the necessary funds for the operation and maintenance of eligible channels and harbors. Pub. L. No. 99-662, § 210, 100 Stat. 4106. Since 1991, the Trust

fee, Congress determined that the commercial users who are the principal beneficiaries of the costs incurred in developing and maintaining channels and harbors—rather than the general taxpaying public—should finance the upkeep of these facilities. S. Rep. No. 126, *supra*, at 9.

b. The Harbor Maintenance Tax is collected by the United States Customs Service. Importers remit such payments to the Customs Service along with payments of customs duties. Exporters and domestic shippers, who pay no duties, remit the tax to the Customs Service on a quarterly basis pursuant to 19 C.F.R. 24.24. The monies collected by the Customs Service are then transferred to the Harbor Maintenance Trust Fund pursuant to 26 U.S.C. 9505(b).

2. Respondent loads goods for shipment as exports in ports of the United States and, along with importers and domestic shippers, is therefore subject to the Harbor Maintenance Tax. After making several payments of this port user charge, respondent commenced this refund suit in the United States Court of International Trade. Respondent claimed that application of the Harbor Maintenance Tax to cargo loaded in a port of the United States for export violates the Export Clause of the Constitution, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5.

The Court of International Trade agreed with respondent that the Harbor Maintenance Tax imposes a

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Fund has provided approximately 100 percent of those funds. Water Resources Development Act of 1990, Pub. L. No. 101-640, § 316, 104 Stat. 4641.

prohibited tax on exports (App., *infra*, 46a-89a).[2] The court rejected the government's contention that this statutory fee for "any port use" (26 U.S.C. 4461(a)) is a permissible charge for the use of port facilities. The court stated that "there is little indication that Congress intended to establish a user fee" (App., *infra*, 56a) and that the "primary purpose of the [Har-

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[2] In enacting the Harbor Maintenance Tax, Congress specified that, "[f]or purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. 4462(f)(2); see *id.* 4462(f)(1). The Senate Report explained that "the Court of International Trade is to have primary jurisdiction for actions involving the port user charge provisions." S. Rep. No. 228, *supra*, at 10. Respondent seeks a refund of payments for which it made a timely administrative protest with the Customs Service pursuant to the provisions applicable to customs duties (19 U.S.C. 1514, 1515). The government acknowledged that the Court of International Trade has jurisdiction in this case, for respondent's claim "contest[s] the denial of a protest" (28 U.S.C. 1581(a)). The Court of International Trade held, however, that, regardless of any protest, the court would have jurisdiction under 28 U.S.C. 1581(i) because respondent's claim was filed in that court within two years after the tax was paid. See App., *infra*, 75a-76a; 28 U.S.C. 2636(i). That holding was affirmed by the Federal Circuit. App., *infra*, 14a.

We do not seek review of that holding in this petition. Whether the jurisdiction of the court rests upon 28 U.S.C. 1581(a)—because respondent seeks review of a denial of a protest—or upon 28 U.S.C. 1581(i)—because this suit was commenced within two years of payment—has no relevance to the proper disposition of this case. That issue is of relevance only for other claimants, who have challenged the Harbor Maintenance Tax without first filing an administrative protest. This jurisdictional issue is, moreover, peculiar to the refund requests of exporters under the Harbor Maintenance Tax and lacks recurring application in other contexts.

bor Maintenance] Tax is to raise revenue" (*id.* at 57a). The court reasoned that "little nexus binds the imposition of the *ad valorem* tax on cargo to the costs of port maintenance" and that the "fees collected * * * yield funds for the purpose of maintaining and developing American ports and harbors for all uses, commercial and recreational" (*id.* at 58a). The court concluded that Congress impermissibly imposed a constitutionally proscribed "duty under the pretext of fixing a fee" (*id.* at 57a, quoting *Pace* v. *Burgess*, 92 U.S. 372, 376 (1876)).

The court assumed, without deciding, that the statutory fee for "any port use" imposed by the Harbor Maintenance Tax (26 U.S.C. 4461(a)) does not discriminate against exports. The court nonetheless concluded that, as applied to goods loaded for export, the tax violates the Export Clause because it is not fairly related to "the cost of the benefits port users receive from harbor maintenance and development projects" (App., *infra*, 60a). The court stated that the port use fee imposed by the Harbor Maintenance Tax has yielded revenues "in excess of costs incurred" in operating and maintaining port facilities and that these funds may be "used to fund projects yet to be commenced, or even envisioned" (*ibid.*). The court reasoned that the charge is therefore "excessive in relation to the cost to the government" of providing port facilities (*ibid.*).

3. a. The Federal Circuit has exclusive jurisdiction over appeals from decisions of the Court of International Trade. 28 U.S.C. 1295(a)(5). Sitting as a five-judge panel in this case, the court of appeals affirmed the decision of the court below (App., *infra*, 1a-30a), with one judge dissenting (*id.* at 31a-45a). The court held that the port use fee imposed by the

Harbor Maintenance Tax is unconstitutional as applied to goods loaded for export from the ports of the United States.

The court of appeals noted that, under this Court's decisions in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U.S. 707 (1972), and *Massachusetts* v. *United States*, 435 U.S. 444 (1978), a government fee exacted in connection with the provision of services may constitutionally be applied to goods for export if the fee (i) does not discriminate against exporters, (ii) is based upon a fair approximation of use and (iii) is not excessive in relation to the costs incurred by the government in providing the services (App., *infra*, 17a). Without addressing the first and third prongs of this test, the court concluded that the Harbor Maintenance Tax is unconstitutional as applied to goods for export because "there is no correlation between the amount of [the tax] an exporter pays and the amount the exporter uses the port" (*ibid.*).

The court of appeals gave three reasons for its conclusion. First, the court noted that the tax is imposed on and collected from the party who ships the goods rather than on "the ship owners" who are the "direct users" of the ports and harbors (App., *infra*, 19a). Second, the court stated that, because the statutory port use fee is assessed on the *value* of goods being shipped, it lacks any reasonable connection with the cost or value of the benefits provided from use of the port (*id.* at 21a-22a). Third, the court found it objectionable that "exporters are forced to pay for harbor maintenance across the entire country, even though they receive no benefit from maintained harbors at any port other than the one they actually use" (*id.* at 22a).

The court rejected the government's contention that a fee based solely upon the use of a port is not a tax on an "[a]rticle of export" within the meaning of the Export Clause. The court reasoned that the fee falls on the goods, and not on the use of the port, because it "is imposed on an *ad valorem* basis at the time the exported goods are loaded on the vessel" and the "exporter, rather than the manufacturer, pays the tax" (App., *infra*, 24a).

The court also rejected the government's contention that the Harbor Maintenance Tax is not a proscribed tax on exports because it constitutes a valid exercise of the power of Congress to regulate interstate and foreign commerce. The court concluded that the statutory fee on "port use" is not a regulation of commerce because the fee "regulates nothing" (App., *infra*, 27a). The court stated that the Harbor Maintenance Tax does not regulate commerce because "[i]t is not designed to reduce the overall use of the ports" and because "the government has not persuaded us that the [tax] is designed to simply recoup the costs of the services" provided to users of ports and harbors (*ibid.*).

b. Judge Mayer dissented. He noted that a user fee differs from a tax because "a tax is enacted to raise revenue 'to go to the general support of the government,' *see Head Money Cases*, 112 U.S. 580, 596 (1884), while a user fee is designed as a specific charge for the use of government facilities and services" (App., *infra*, 32a). Based upon the text and the extensive legislative history of the statute, Judge Mayer concluded that the Harbor Maintenance Tax is a constitutionally valid fee for the use of harbor facilities that satisfies all three prongs of the test established by this Court in *Massachusetts* v. *United States*, 435 U.S. at 464, 466-470.

First, Judge Mayer disagreed with the majority's conclusion that a fee assessed equally against exporters and all other shippers for the use of the ports of the United States is constitutionally infirm because the parties who must pay the fee are not the "direct beneficiaries" of the services that the government provides. He noted that this conclusion is illogical as a matter of economics and also "flies in the face of Congress' finding that exporters are the direct beneficiaries" of port services (App., *infra*, 42a). Because the ultimate burden of any fee imposed on "port use" is allocated by economics, not by statute, Judge Mayer emphasized that "it is unimportant whether the fee be assessed against exporters and importers, the ultimate beneficiaries of the harbor maintenance and operations projects, or against the actual vessel owner, to be passed on to the importers or exporters if it chooses" (*ibid.*).

Judge Mayer also rejected the majority's conclusion that the Harbor Maintenance Tax is not fairly related to the costs incurred by the government in providing and maintaining port facilities (App., *infra*, 39a-45a). It was expressly to avoid discrimination among ports and port users that Congress chose to allocate the costs of providing these services under a nationally-uniform charge based upon the value of goods shipped (*id.* at 39a). Judge Mayer concluded that the Constitution does not require Congress to calculate the port use fee separately for each port, because "[e]very exporter has all ports and harbors available to it" (*id.* at 40a).

REASONS FOR GRANTING THE PETITION

In holding the Harbor Maintenance Tax unconstitutional as a tax on exports, the Federal Circuit has seriously misapplied the precedents of this Court. Because the Federal Circuit has exclusive jurisdiction over appeals from both the Court of International Trade and the Court of Federal Claims, any appeal from the approximately 4000 pending challenges to the Harbor Maintenance Tax would necessarily be to that circuit. It is therefore unlikely that any other court of appeals will have an opportunity in the future to review this same issue.

The numerous pending cases seek refunds of hundreds of millions of dollars of fees that have been collected to fund the operation and development of the ports of the United States. In similar circumstances, this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal importance. See, *e.g.*, *United States* v. *Hill*, 506 U.S. 546, 549 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). Such review is especially appropriate in this case because the Federal Circuit has held an Act of Congress unconstitutional.

1. a. This Court has long recognized the distinction that exists between an unconstitutional "Tax or Duty * * * laid upon Articles exported" (U.S.Const. Art. I, § 9, Cl. 5) and a permissible user fee that exacts "compensation * * * for services properly rendered." *Fairbank* v. *United States*, 181 U.S. 283, 304 (1901), quoting *Pace* v. *Burgess*, 92 U.S. 372, 375 (1875). "[R]evenue measures that operate only to compensate a government for benefits supplied" are

not constitutionally proscribed, for the government "has an obvious interest in making those who specifically benefit from its services pay the cost" (*United States* v. *Massachusetts*, 435 U.S. at 462).[3]

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[3] The court of appeals did not dispute that Congress may properly exercise its power under the Commerce Clause to "recoup the costs of the services" provided to users of ports and harbors (App., *infra*, 27a). A burden upon exports imposed pursuant to a valid exercise of Congress's power to regulate commerce does not violate the Export Clause. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 78-80 (1908). The powers to tax and to regulate commerce are independent sources of legislative authority. See *Richfield Oil Corp.* v. *State Board of Equalization*, 329 U.S. 69, 75, 76 (1946); *Board of Trustees of University of Illinois* v. *United States*, 289 U.S. 48, 58 (1933). Restrictions applicable to the taxing power are not directly implicated when Congress imposes a fee to recover expenses incurred in promoting commerce. See, *e.g.*, *Packet Co.* v. *Keokuk*, 95 U.S. 80 (1877) (fees assessed for wharf usage were charges for services and not a tax); *New Orleans Steamship Ass'n* v. *Plaquemines Port, Harbor and Terminal Dist.*, 690 F. Supp. 1515, 1522 (E.D. La. 1988) ("charges levied to defray the cost of services that do not hamper, but indeed, aid interstate commerce, have consistently been upheld by the Supreme Court"), aff'd, 874 F.2d 1018 (5th Cir. 1989), cert. denied, 495 U.S. 932 (1990).

That the Harbor Maintenance Tax does not "reduce the overall use of the ports" (App., *infra*, 27a) does not support the conclusion of the court of appeals that the port use fee is not a regulation of commerce. Congress enacted the fee to provide funds to enhance, not reduce, commercial use of port facilities. The Harbor Maintenance Tax was enacted to provide funds "for operations and maintenance of U.S. channels and harbors (ports) in order to improve and maintain such ports for waterborne commerce." S. Rep. No. 228, *supra*, at 5. Congress concluded that "[s]uch additional investment in U.S. ports will facilitate economic development and make the Nation's water transportation system more efficient." *Ibid.* The compulsory contribution that Congress has required from those who benefit

In determining whether a charge imposed on the use of commercial facilities provided by the government constitutes a "tax" within the proscription of the Export Clause or a permissible charge for "services properly rendered," the initial inquiry is whether the primary purpose of the charge is to earn revenue: "The point to guard against is, the imposition of a duty under the pretext of fixing a fee." *Pace* v. *Burgess*, 92 U.S. at 375-376. See also *Fairbank* v. *United States*, 181 U.S. at 304. Enhancement of the general revenue, however, is plainly not an overt or disguised purpose of the Harbor Maintenance Tax.

This statutory fee on "any port use" (26 U.S.C. 4461(a)) was enacted as part of a comprehensive legislative program providing for the operation and development of harbor and port facilities throughout the Nation. As Judge Mayer noted in dissent in this case (App., *infra*, 32a-33a), Congress expressly contemplated that the charges imposed by the Harbor Maintenance Tax represent a user fee, rather than a "tax," in the constitutional sense. See, *e.g.*, S. Rep. No. 228, *supra*, at 5 ("the committee amendment imposes new port user charges"). In imposing this fee on the commercial use of ports of the United States, Congress explained that "[t]he taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and

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from the costs of providing such facilities "is a species of economic regulation that should enjoy the same strong presumption of validity that [is afforded] to other policy judgments made by Congress" (*Glickman* v. *Wileman Bros. & Elliott, Inc.*, 117 S. Ct. 2130, 2142 (1997)).

taxes offset services rendered to vessels." S. Rep. No. 126, *supra*, at 7.

Consistent with this clear statement of legislative purpose, the fees collected under this statute are deposited in the specially designated Harbor Maintenance Trust Fund, from which they may be expended only for port and harbor maintenance. 26 U.S.C. 9505(c). These funds may not be used to support the general welfare. See App., *infra*, 36a (Mayer, J., dissenting) ("The government has been true to this constraint.").

The fact that this Trust Fund currently enjoys a positive balance (see note 1, *supra*) does not mean, as the courts below erroneously concluded (App., *infra*, 57a-58a), that the Harbor Maintenance Tax is a disguised and proscribed "tax" rather than a valid "fee" for services. The precise level of funding required each year for the development, maintenance and operation of harbor resources obviously fluctuates over time. As this Court explained in *Massachusetts* v. *United States*, 435 U.S. at 470 n. 25, in rejecting the same contention adopted by the court of appeals in this case:

> Even if the revenues in any one year exceeded the outlays, it would not follow that the tax is invalid as applied. * * * [T]he validity of the tax [is] determined by comparing total revenue with total outlays: *i.e.*, a surplus of revenue over outlays in any one year can be offset against actual deficits of past years and perhaps against projected deficits of future years.

See also *Alamo Rent-A-Car, Inc.* v. *Sarasota-Manatee Airport Authority*, 906 F.2d 516, 522 (11th Cir. 1990) ("given the long term nature of maintaining

and developing an airport, it was appropriate * * * to factor in future development plans when setting user fees."), cert. denied, 498 U.S. 1120 (1991).

The decision of the court of appeals thus seriously misapplies this Court's precedents in concluding that the charges imposed by the Harbor Maintenance Tax represent an unconstitutional "duty" masquerading as a "fee." As the dissent instead correctly emphasizes (App., *infra*, 32a-33a), the relevant fact is that the Trust Fund into which the fees are deposited may not be expended *at any time* for any purpose other than the operation, maintenance and development of harbor and port facilities for commercial navigation. See 26 U.S.C. 9505(c); H.R. Rep. No. 881, 101 Cong., 2d Sess. 288 (1990).

b. The decisions of this Court establish that a user fee does not constitute a proscribed "tax" if the fee (i) does "not discriminate against" a constitutionally protected interest, (ii) is "based upon some fair approximation of use" and (iii) is "not shown to be excessive in relation to the cost to the government of the benefits conferred." *Massachusetts* v. *United States*, 435 U.S. at 464. See also *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U.S. at 716-720. When, as in the present case, the statute was enacted with a "specific declaration by Congress that the [fees collected] are intended to reimburse costs incurred by the United States, the burden must lie with [the plaintiff] to demonstrate that" the fee, in reality, is impermissibly designed to raise general revenues. *United States* v. *Sperry Corp.*, 493 U.S. 52, 60 (1989).

The court of appeals did not conclude that the Harbor Maintenance Tax discriminates against exports. Nor did the court conclude that the fee imposed by the

statute is excessive in relation to the costs of the benefits conferred (App., *infra*, 17a).[4] Instead, the court concluded that the statutory fee is unconstitutional because it is not based upon some "fair approximation of use" of the ports of the United States (*id.* at 23a). Each of the three rationales offered by the court of appeals in support of its conclusion is incorrect and conflicts with decisions of this Court.

(i) The court of appeals stated that the statutory fee is not based upon some "fair approximation of use" because it is imposed on exporters and other parties who ship goods rather than on "the ship owners" who are the "direct users" of the Nation's ports and harbors (App., *infra*, 18a, 19a). The court of appeals provided no citations of authority to support this proposition, however, and no such authority exists.[5]

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[4] The Harbor Maintenance Tax clearly satisfies these two prongs of the test used by this Court in determining whether the exaction is a permissible user fee. The statutory fee applies to all importers, exporters and domestic shippers (26 U.S.C. 4461(c)) and thus does not discriminate against exporters. And, for the reasons described in the text (pages 14-15, *supra*), the fees collected are not excessive in relation to the expenditures made by the government. Although the Trust Fund currently enjoys a positive balance, that fact does not affect the constitutionality of the fee. See, *e.g.*, *Massachusetts* v. *United States*, 435 U.S. at 470 n.25; App., *infra*, 44a (Mayer, J., dissenting). For example, in *New Hampshire Motor Transport Association* v. *Flynn*, 751 F.2d 43, 47 (1st Cir. 1984), the court upheld a user fee even though the monies collected were to be used to fund projects not yet commenced rather than to repay the government for past services rendered.

[5] Respondent argued in the court of appeals that only a "direct beneficiary" of a government program may be subjected to a fee for the costs of that program. Respondent claimed that such a rule was established in *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974). That

Indeed, this Court has expressly rejected the very rationale on which the court of appeals relied. In *United States* v. *Sperry Corp.*, 493 U.S. at 60, quoting *Massachusetts* v. *United States*, 435 U.S. at 463 n.19, the Court explained that it:

> has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. * * * All that we have required is that the user fee be a "fair approximation of the cost of benefits suppplied."

In upholding a government fee imposed on the use of airport facilities in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U.S. at 714 (emphasis supplied), the Court emphasized that it is "not * * * particularly important whether the charge is imposed on the passenger himself, to be collected by the airline, or on the airline, to be passed on to the passenger if it chooses. *In either case, it is the act of enplanement and the consequent use of runways and other airport facilities that give rise to the obligation.*"

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decision, however, concerned whether a particular agency fee had been authorized by a particular statute. See *id.* at 342-344. The Court "recognized that it was not announcing universal definitions of 'tax' and 'fee'" but was "simply determining the meaning of these terms in a particular context quite different from that presented in" cases involving the limitations on taxing authority under the Export and Import-Export Clauses. *Union Pacific Railroad Co.* v. *Public Utility Comm'n*, 899 F.2d 854, 861 (9th Cir. 1990). See also *San Juan Cellular Telephone Co.* v. *Public Service Commission of Puerto Rico*, 967 F.2d 683, 687 (1st Cir. 1992); *Maine* v. *Department of Navy*, 973 F.2d 1007, 1014 (1st Cir. 1992); *Florida Power & Light Co.* v. *United States*, 846 F.2d 765 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045 (1989).

Here, as in *Evansville*, it is the use of government-provided "facilties that give[s] rise to the obligation" to pay the fee. As Judge Mayer correctly concluded in dissent in this case, because the ultimate burden of any fee imposed on "port use" is allocated by economics, not by statutes, "it is unimportant whether the fee be assessed against exporters and importers, the ultimate beneficiaries of the harbor maintenance and operations projects, or against the actual vessel owner, to be passed on to the importers or exporters if it chooses" (App., *infra*, 42a). The court of appeals improperly ignored the holding of this Court in *Evansville* in reaching its erroneous decision in this case.

The court of appeals similarly erred in ignoring the determination of Congress that it is the exporters and other shippers, and not "the ship owners" (App., *infra*, 19a), who are the "direct beneficiar[ies]" of port maintenance services. Congress enacted the Harbor Maintenance Tax to avoid the harsh consequences that inadequate and deteriorating ports and harbors would have for commercial shippers. S. Rep. No. 126, *supra*, at 8. The fee on "port use" was designed specifically to provide funding to enhance the facilities available for transporting the goods of commercial shippers. In assessing the port use fee against the shippers who use these facilities, Congress rationally concluded that "a portion of Federal expenditures needed for port operations and maintenance should be borne by the direct beneficiaries of such expenditures." S. Rep. No. 228, *supra*, at 5. The court of appeals lacked any plausible basis for rejecting this determination of Congress that the shippers are the "direct beneficiaries of such expenditures" (*ibid.*).

(ii) The court of appeals also erred in holding that the statutory fee on "port use" is not based upon a "fair approximation of use" because it is assessed on the *value* of goods being shipped rather than on tonnage or some other factor (App., *infra*, 21a). That holding conflicts with numerous decisions of this Court.

"This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services." *United States* v. *Sperry Corp.*, 493 U.S. at 60. Recognizing that, "when the Federal Government applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system," the Court has specifically "declined to impose a requirement that the Government 'give weight to every factor affecting appropriate compensation.'" *Id.* at 61, quoting *Massachusetts* v. *United States*, 435 U.S. at 468.

For example, flat registration fees that do not vary based upon the amount of use have been sustained if that fee recovers a "fair approximation of the costs of the benefits supplied." *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U.S. at 716-717. Fees for the use of transportation resources based upon the "fair market value" of the vehicle or upon the gross revenues of the transportation service have also been sustained. See *id.* at 715-716; *Alamo Rent-A-Car, Inc.* v. *Sarasota-Manatee Airport Authority*, 906 F.2d at 516.

Mileage or tonnage is not a necessary factor in calculation of a transportation use fee. As the Court emphasized in rejecting the challenge to the flat registration fee assessed in *Massachusetts* v. *United States*, 435 U.S. at 463, quoting *Capitol Greyhound*

Lines v. *Brice*, 339 U.S. 542, 545 (1950), the validity of a use fee "should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted." Accord *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines*, 405 U.S. at 716. Even though "[c]omplete fairness" would require that the use fee be calibrated based upon "every factor affecting appropriate compensation" for the government services provided, "[t]hese factors * * * are so countless that we must be content with 'rough approximation rather than precision.'" *Capitol Greyhound Lines* v. *Brice*, 339 U.S. at 545, quoting *International Harvester Co.* v. *Evatt*, 329 U.S. 416, 422-423 (1947).

The statutory fee for port use satisfies the requirement that it not "be unreasonable in amount for the privilege granted." The funds obtained through collection of the fee recover the costs incurred in providing port services (pages 14-15, *supra*), and the fee is imposed on the parties whose goods are enhanced in value by these services. A recovery of a portion of the value of the benefits conferred—from those who receive that value—is not "unreasonable in amount for the privilege granted." In holding to the contrary in this case, the court of appeals failed to adhere to this Court's consistent admonition that the validity of the fee is to be "judged by its result, not its formula."

The Court has often emphasized that perfection in the allocation of costs among those who benefit is not required. For more than a century, the Court has recognized that "[p]erfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream." *Head Money Cases*, 112 U.S. 580, 595 (1884). It is therefore "the amount of the tax, not its formula, that is of

central concern." *Evansville Airport Authority District* v. *Delta Airlines*, 405 U.S. at 716-717. In *United States* v. *Sperry Corp.*, 493 U.S. at 60, for example, the Court upheld a federal fee imposed for use of the Iran Claims Tribunal that was based solely on the value of the recovery. In upholding that *ad valorem* fee, the Court specifically rejected the notion "that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services." *Ibid.* It is thus "beyond dispute that an ad valorem charge can be a user fee" (App., *infra*, 41a (Mayer, J., dissenting), citing, *e.g.*, *United States* v. *Sperry Corp.*, 493 U.S. at 59-64; *Alamo Rent-A-Car, Inc.* v. *City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992)).

Congress reasonably concluded that an *ad valorem* fee was appropriate in the present context as well. Such a formula reasonably charges the costs of port operations to those who benefit from actual use of the ports. Moreover, allocating costs based upon the value of the goods being shipped substantially reduces administrative costs and burdens.[6] Congress was aware that the Customs Service "has a strong presence at ports of entry and is experienced at appraising imported merchandise." S. Rep. No. 228, *supra*, at 10. Because the core information collected by the Customs Service concerns the value of the cargo, structuring the Harbor Maintenance Tax on an *ad valorem* basis reduces administrative costs by utilizing

[6] The Court noted in *Massachusetts* v. *United States*, 435 U.S. at 466 that, "[i]f the National Government were required more precisely to calibrate the amount of the fee to the extent of the actual use of the airways, administrative costs would increase and so would the amount of revenue needed to operate the system."

the existing data collection system. Extensive testimony was presented to Congress favoring such an *ad valorem* fee over a port-specific fee or a flat tonnage fee. See, *e.g.*, *User Fees for Ports and Waterways: Hearing Before the Senate Comm. on Finance*, 99th Cong., 1st Sess. 47 (1985) (*Senate Hearing*); *Water Resource Conservation, Development, and Infrastructure Improvement Act of 1985: Hearing Before the House Comm. on Ways and Means*, 99th Cong., 1st Sess. 59 (1985) (*House Hearing*). Shippers of low-value cargo testified that any fee for port use that was calculated upon tonnage would "disproportionately * * * affect bulk cargo marketability when compared to [its] impact on containerized cargo. It also would disadvantage export dependent ports in contrast to import dependent ports." *Senate Hearing*, *supra*, at 19; see *House Hearing*, *supra*, at 59. In imposing the statutory fee on an *ad valorem* basis, Congress rationally concluded that shippers of higher value cargo would receive greater benefits (*e.g.*, greater profits) from the enhancement of port facilities and that value is therefore "the only acceptable basis on which to impose such charges. This national, uniform basis minimizes any possible competitive disadvantages among cargo types and U.S. ports which otherwise might result from user charges." S. Rep. No. 228, *supra*, at 5-6.

In overruling the method of "fair approximation" that Congress reasonably elected to employ in imposing this fee for port use, the court of appeals thus disregarded not only the decisions of this Court but also the clear legislative record. In particular, the court failed to follow the well-established rule, summarized by this Court in *Fairbank* v. *United States*,

181 U.S. at 304, quoting *Pace* v. *Burgess*, 92 U.S. at 375-376, that:

> proper fees * * * are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. The rule by which they are estimated may be an arbitrary one; but an arbitrary rule may be more convenient and less onerous than any other which can be adopted. * * * [H]aving due regard to that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we cannot say that the charge imposed is excessive or that it amounts to an infringement of the constitutional provision * * * .

(iii) The court of appeals further erred in concluding that the statutory port use fee is objectionable because "exporters are forced to pay for harbor maintenance across the entire country, even though they receive no benefit from maintained harbors at any port other than the one they actually use" (App., *infra*, 22a). This Court rejected an identical contention in sustaining a federal fee for airport services in *Massachusetts* v. *United States*, 435 U.S. at 468. The Court explained that, even though a user may actually land or take off from only a limited number of facilities, charging a nationally-uniform fee that contributes to a national fund for airport services is permissible because nationwide "services are available for their use if needed and * * * the provision of the services makes the airways safer for all users." *Ibid.* (footnote omitted) See also *Maine* v. *Department of Navy*, 973 F.2d at 1013-1014 (upholding a state fee as a "fair approximation" of the use of state

services when the parties benefit from the availability of the services as well as from any actual use). The decision of the court of appeals in this case conflicts with this settled rule.

2. Several thousand cases pending in the Court of International Trade and the Court of Federal Claims raise the same question presented in this case. The fees imposed by the Harbor Maintenance Tax involved in these cases exceed several hundred million dollars. Any appeal from judgments rendered in these cases will lie exclusively to the Federal Circuit. 28 U.S.C. 1295(a)(3), (5). It is therefore unlikely that any other court of appeals will have an opportunity to review the issue decided in this case.

In similar contexts, this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal importance. See, *e.g.*, *United States* v. *Hill*, 506 U.S. at 549; cases cited page 12, *supra*. Such review is particularly appropriate when, as in the present case, the Federal Circuit has failed to follow the decisions of this Court in improperly declaring an Act of Congress unconstitutional.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 96-1210

UNITED STATES SHOE CORPORATION,
PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

Decided: June 3, 1997

Before: MAYER, MICHEL, RADER, and BRYSON, *Circuit Judges*, and SMITH, *Senior Circuit Judge*.

Opinion for the court filed by *Circuit Judge* MICHEL. Dissenting opinion filed by *Circuit Judge* MAYER.

MICHEL, *Circuit Judge*.

The United States ("the government") appeals from the December 4, 1995 decision of the United States Court of International Trade granting summary judgment to United States Shoe Corporation ("US Shoe") and holding that the court possessed jurisdiction over this case pursuant to 28 U.S.C. § 1581(i), not 28 U.S.C. § 1581(a), that the Harbor Maintenance Tax ("HMT") violates the United States Constitution and is therefore void as applied to exports. *See United States Shoe Corp. v. United States*, 907 F. Supp. 408 (Ct. Int'l Trade 1995). The case was submitted for our

decision after oral argument by the parties before a five-judge panel on February 7, 1997, following briefing not only by the parties but also by numerous amici. The Court of International Trade correctly exercised jurisdiction under 28 U.S.C. § 1581(i) and correctly concluded that the HMT violates the Export Clause, U.S. Const., Art. 1, § 9, cl. 5, because it is a tax on exports rather than a user fee. The HMT, as applied to exports, is not a user fee but rather a tax because it is paid by the exporter, not the direct user of the harbor, and is calculated solely based on the value of the cargo loaded for export and bears no reasonable relationship to the cost of the use of the port facilities maintained by the government and therefore cannot be a fair approximation of use. We therefore affirm the judgment invalidating the HMT as applied to exports and ordering a refund to U.S. Shoe.

BACKGROUND

The HMT was imposed by Congress as part of the Comprehensive Water Resources Development Act of 1986 ("the Act"), Pub. L. No. 96-622, 100 Stat. 4082 (codified at 26 U.S.C. § 4461). The Act also established the Harbor Maintenance Trust Fund ("the Trust Fund") to provide for the operation and maintenance of channels and harbors. The details of the HMT, the Act, and the Trust Fund relevant to this lawsuit are set forth in the trial court's opinion and are not repeated here in detail. *See United States Shoe*, 907 F. Supp. at 411-12.

In short, the Act imposes an *ad valorem* tax of 0.125 percent of the value of the commercial cargo involved in "any port use" of federally maintained navigable waterways. 26 U.S.C. §§ 4461, 4462(a)(2) (1994).

The HMT is imposed on both exports and imports. As it specifically applies to exports, the HMT statute provides:

> (a) General rule.—There is hereby imposed a tax on any port use.
>
> (b) Amount of tax.—The amount of tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.
>
> (c) Liability and time of imposition of tax.—
>
> (1) Liability.—The tax imposed by subsection (a) shall be paid by—
>
> . . .
>
> (B) in the case of cargo to be exported from the United States, the exporter....
>
> (2) Time of imposition.—Except as provided by regulations, *the tax imposed by subsection (a) shall be imposed—*
>
> (A) *in the case of cargo to be exported from the United States, at the time of loading.* ...

26 U.S.C. § 4461 (1994) (emphasis added). The term "port use" is defined as "the loading of commercial cargo on, or ... the unloading of commercial cargo from, a commercial vessel at a port." 26 U.S.C. § 4462(a)(1) (1994). The term "port" is defined as "any channel or harbor (or component thereof) in the United States, which ... (i) is not an inland waterway, and (ii) is open to public navigation." 26 U.S.C.

§ 4462(a)(2)(A) (1994). The term "commercial cargo" is defined as "any cargo transported on a commercial vessel, including passengers transported for compensation or hire," but does not include "bunker fuel, ship's stores, sea stores, or the legitimate equipment necessary to the operation of a vessel, or ... fish or other aquatic animal life caught and not previously landed on shore." 26 U.S.C. § 4462(a)(3) (1994). Thus, although there are certain exemptions, the tax is generally imposed against all imports, exports, domestic shipments, and passengers. *See* 26 U.S.C. §§ 4461(c)(1), 4462(a)(3)(A) (1994).[1] Money collected pursuant to the Act is transferred by Customs to the Trust Fund for disbursal upon further appropriation by Congress. *See* 26 U.S.C. § 9505(b) (1994). The fees were designed to finance the cost of harbor dredging. *See* S. Rep. No. 99-126 at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647. By the end of fiscal year 1994, the total amount of fees collected and deposited in the Trust Fund was over 2.7 billion dollars, of which over 700 million dollars was paid by exporters.

Although the HMT was first enacted in 1986, there were no constitutional challenges until recently. US Shoe paid the HMT on articles exported for the period April 1 through June 30, 1994. US Shoe then brought suit in the Court of International Trade for the refund of these payments on the ground that the HMT, as applied to exports, is unconstitutional. In January 1995, given the large number of pending lawsuits

[1] For passengers the tax is calculated based on the charge assessed for transportation. *See* 26 U.S.C. § 4462(a)(5)(B) (1994).

challenging the constitutionality of the HMT,[2] the Court of International Trade established a three-judge panel and heard this case as a test case. *See* 28 U.S.C. § 255 (1994) (authorizing the chief judge of the Court of International Trade to designate a three-judge panel to hear cases raising the constitutionality of any Act of Congress or which have broad or significant implications in the administration or interpretation of customs laws).

The parties filed cross-motions for summary judgment and, on October 25, 1995, the trial court issued its decision granting U.S. Shoe's motion for summary judgment. *United States Shoe*, 907 F. Supp. at 408. The trial court first concluded that the HMT was unconstitutional as applied to exports because it constituted a tax, rather than a user fee, as it did not have regulation as its primary purpose and it did not recoup the costs of services provided to the payor. *Id.* at 413-18. Specifically, the trial court noted that "the Act neither discourages nor regulates use of a harbor; neither does it so intend." *Id.* at 413. The trial court also found that "the primary purpose of the [HMT] is to raise revenue, as Congress has imposed 'a duty under the pretext of fixing a fee.'" *Id.* at 414 (citation omitted). The trial court further determined that jurisdiction was not properly based on 28 U.S.C. § 1581(a), because there was no decision of Customs to protest. *Id.* at 418- 21. In part, the trial court relied

[2] As of the summer of 1996, there were approximately 2400 complaints pending in the Court of International Trade, as well as approximately 40 complaints pending before the Court of Federal Claims and one complaint pending in district court. The great majority of these lawsuits have been stayed pending the outcome of this appeal.

on the fact that "Customs does not determine the application, policies, or rates of the [HMT], but merely serves to implement its provisions." *Id.* at 420. Rather, the trial court held jurisdiction was properly based on 28 U.S.C. § 1581(i) because Congress directed that the HMT be treated as a customs duty and because customs duties, by their very nature, provide for revenue from imports. *Id.* at 421. The Court of International Trade enjoined the government from assessing and collecting the HMT and ordered the parties to file a proposed judgment.

The government appealed, urging that we hold that jurisdiction over these disputes is only proper pursuant to 28 U.S.C. § 1581(a) and that the HMT is constitutional. We heard this case as a five-judge panel pursuant to Local Rule 47.2, which states that "appeals in cases from the Court of International Trade decided by a three-judge court pursuant to 28 U.S.C. § 255 will ordinarily be referred to a panel of five judges." Fed. Cir. R. 47.2.

ANALYSIS

We "review the summary judgment in this case 'for correctness as a matter of law, deciding *de novo* the proper interpretation of the governing statute and regulations as well as whether genuine issues of material fact exist.'" *St. Paul Fire & Marine Ins. Co. v. United States*, 6 F.3d 763, 767 (Fed. Cir. 1993) (quoting *Guess? Inc. v. United States*, 944 F.2d 855, 857 (Fed. Cir. 1991)). Here, the parties do not dispute any facts, but only dispute questions of law relating to the proper interpretation of the jurisdictional statutes and the constitutionality of the HMT as applied to exports.

I.

The parties do not dispute that the Court of International Trade possesses exclusive jurisdiction over this type of matter seeking a refund of HMT pursuant to 28 U.S.C. § 1581, in light of Congress' provision that "[f]or purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. § 4462(f)(2) (1994). The only dispute is whether subsection (a) or subsection (i) of section 1581 applies. The dispute exists because subsection (a) requires that the exporter first file a protest and limits recovery to amounts protested within 90 days of payment, while subsection (i) states only that the action must be initiated within two years of the date on which the cause of action accrued.

The relevant statutory subsections provide as follows:

> (a) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930.
>
> * * * * *
>
> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subjection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies,

or its officers, that arises out of any law of the United States providing for -

(1) revenue from imports or tonnage;

(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;

(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or

(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section. ....

28 U.S.C. § 1581 (1994).

A.

Although admitting that it does not fit perfectly, the government argues that subsection 1581(a) nevertheless confers jurisdiction over this dispute. The government argues section 1581(a) is the "established route" for obtaining judicial review of duties, charges, and exactions imposed by Congress. As Congress envisioned that the HMT would be treat ed like a duty, the government argues jurisdiction under this subsection is the only logical result. The government admits, as it must, that subsection (a) requires that prior to the time an exporter can seek judicial review, Customs must issue a decision, the decision must be protested, and the protest must be denied. *See* 19 U.S.C. §§ 1514 (stating that decisions of the Customs Service are final unless a protest is filed), 1515

(stating that all protests will be reviewed within two years of filing). The government argues that the relevant "decision" is Customs' acceptance of the exporter's payment. In support, the government points to a generic regulation suggesting that the date of exaction (the date of payment) constitutes a protestable event. *See* 19 C.F.R. § 174.12(e) (1996) ("Protests shall be filed ... within 90 days after ... [t]he date of the decision, involving neither a liquidation nor reliquidation, as to which the protest is made (e.g., the date of an exaction. ...")). According to the government, this regulation eliminates any confusion regarding the availability, timing or other procedures applicable to a protest and over 1000 HMT protests have been received by Customs pursuant to this regulation.

Relying on legislative history, U.S. Shoe responds that Congress directed that the HMT be treated like a duty so that the Court of International Trade, with its expertise in international trade matters, would have jurisdiction over any disputes and so as to facilitate Customs' collection and processing of the HMT. *See* H. Rep. No. 99-228 at 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6714-15 ("In order to facilitate administration and collection of the port user charges [i.e., the HMT] by the U.S. Customs Service, ... all administrative and enforcement provisions ... are to apply ... as if such charges were customs duties."). Thus, according to U.S. Shoe, it is not clear that Congress intended for jurisdiction over this type of dispute to fall within a particular subsection of section 1581, and there is no evidence that Congress intended to amend the requirement of 19 U.S.C. § 1514 that there must be a Customs "decision" before filing a protest. US Shoe further argues that acceptance of

payment is not a protestable decision and that therefore subsection (a) cannot apply.

We find US Shoe's arguments persuasive. Subsection (a) is not directly applicable because it applies to suits commenced to contest the denial of a protest. Decisions of the Customs Service are final unless a protest is filed. 19 U.S.C. § 1514(a) (1994). Decisions can refer to, for example, "the classification and rate and amount of duties chargeable" or "all charges or exactions of whatever character within the jurisdiction of the Secretary of the Treasury." *Id.* While the HMT is likely a charge or exaction, we do not believe that the actual payment or receipt of the HMT can be a "decision" of Customs, as Customs has not made any decision—it merely passively collects money in the amount required by the statute. Customs doesn't even notify exporters of the need to pay the HMT; rather, the exporter pays all accumulated fees on a quarterly basis by simply mailing a check or money order to Customs along with appropriate forms. *See* 19 C.F.R. § 24.24(e)(2)(ii) (1996).

Typically, "decisions" of Customs are substantive determinations involving the application of pertinent law and precedent to a set of facts, such as tariff classification and applicable rate of duty. Indeed, prior case law indicates that Customs must engage in some sort of decision-making process in order for there to be a protestable decision. Thus, for example, in *Dart Export Corp. v. United States*, 43 C.C.P.A. 64 (1956), one of our predecessor courts held that Customs' acceptance of estimated duties paid by an importer upon entry did not constitute a final, protestable decision which would deprive the government of the right to liquidate the entry at a later date, because the payment was based entirely on information provided

by the importer, rather than after analysis and adjudication by Customs. *Id.* at 69-70, 74. Likewise, here, the HMT is based entirely on the exporter's information and calculation. *See* 19 C.F.R. § 24.24(e)(2)(i) (1996). Specifically, this regulation provides that:

> [W]hen cargo is loaded on a commercial vessel for export at a port within the definition of this section, the exporter of that cargo (the name that appears on the SED or equivalent document authorized under 15 CFR 30.39(b)) is liable for the payment of the port use fee at the time of loading. The fee is based upon the value of the shipment loaded as required to be indicated on the SED or equivalent documentation.

Id. Thus, Customs merely passively collects payments calculated by the exporters pursuant to statutes and regulations and performs no active role whatsoever. It performs no analysis; it issues no directives or decisions; it imposes no liabilities.

Similarly, in *Mitsubishi Elec. Am., Inc. v. United States*, 44 F.3d 973 (Fed. Cir. 1994), this court held that the Court of International Trade lacked jurisdiction over Mitsubishi's complaint under section 1581(a) because the Customs Service did not make any antidumping "decisions" as Customs merely followed the Department of Commerce's instructions in assessing and collecting specified duties. *Id.* at 977. The court pointed out that Customs' role was merely ministerial and that Customs did not determine the rate or amount of the antidumping duties. *Id.* Commerce actually conducted the antidumping duty investigation, calculated the antidumping duties, and issued the antidumping order; Customs merely collected the estimated duties. *Id.* at 976. Likewise, here, there

was nothing for Customs to decide, because all substantive particulars regarding the imposition and amount of HMT are established by Congress. The amount of the HMT (0.125 percent of the value of the commercial cargo) is set by statute, 26 U.S.C. § 4461, and the exporter performs the calculation, 19 C.F.R. § 24.24. Customs is merely collecting the HMT in the amount and manner specified by Congress. Thus, there is simply no decision that U.S. Shoe could have protested, or should have been required to protest, in order to allow the Court of International Trade to hear this dispute.

Norfolk & W. Ry. v. United States, 843 F.Supp. 728 (Ct. Int'l Trade 1994), *aff'd*, 62 F.3d 1395 (Fed. Cir. 1995), relied on by the government, is not to the contrary. There, a railroad company brought an action challenging user fees collected on vehicles and vessels entering the United States. *Id.* at 729. The railroad company filed a user fee refund request with the Secretary of the Treasury on the grounds that its railroad barges were not ferries and that, as barges, they were subject to a cap on user fees. *Id.* at 730. The refund request was granted. However, several years later, Customs informed the railroad company that its barges were indeed ferries and not subject to the cap. *Id.* The court concluded that the user fees were charges subject to protest and that jurisdiction fell under 1581(a). *Id.* at 732-33 ("The user fees at issue in this case are clearly 'charges' within the meaning of § 1514(a) and, therefore, are subject to protest under this subsection."). A careful reading of this case, however, makes clear that the user fees were protestable charges because there had been a specific decision by Customs applying statutory definitions that certain vessels were ferries rather than

barges, thus subjecting the cargo to user fees. *Id.* at 730, 733. There, Customs was authorized to collect certain user fees on vehicles and vessels entering the United States. *Id.* at 729. The Railway transported railroad cars on barges into the United States from Canada. *Id.* The amount of fees due varied based on whether the barge was considered a ferry or not. The Railway was notified by Customs that it was required to pay a $7.50 user fee for each of the railroad cars, but no fees for its barges because Customs considered the barges to be ferries. *Id.* at 730. The Railway filed a protest of that decision. There is no comparable analysis and decision here. This is not a case where, for example, U.S. Shoe contended its exports fell within one of the HMT exemptions and Customs decided to the contrary.

We therefore hold that because the collection of the HMT does not involve a protestable decision on the part of Customs, the trial court correctly concluded that jurisdiction over this dispute did not arise under 28 U.S.C. § 1581(a). In light of this holding, we need not reach U.S. Shoe's additional arguments that any protest it might have filed would have been futile or manifestly inadequate.

B.

Given that the Court of International Trade did not possess jurisdiction under 28 U.S.C. § 1581(a), if it possessed jurisdiction over this dispute, as the government concedes that it did, it can only have been pursuant to the default provision, 28 U.S.C. § 1581(i). The government argues subsection 1581(i) cannot apply because that subsection provides for jurisdiction in only those limited circumstances when jurisdiction under any of the other subsections is unavail-

able or manifestly inadequate. However, this is no bar to jurisdiction here because jurisdiction under the other subsections, specifically subsection (a)—the only other arguable possibility—is unavailable. The government also argues that, by its own terms, subsection 1581(i) applies only to imports, not to exports.

We do not agree. As U.S. Shoe persuasively argues, the Court of International Trade properly exercised its jurisdiction under 28 U.S.C. § 1581(i). Congress expressly directed that for jurisdictional, administrative and enforcement purposes, the HMT was deemed to be a customs duty. Thus, it is beyond dispute that Congress intended the Court of International Trade to have jurisdiction over disputes regarding the HMT, as the Court of International Trade has exclusive jurisdiction over customs matters. Moreover, there is no argument made by either U.S. Shoe or the government that the Court of International Trade can exercise jurisdiction over this dispute pursuant to any statute other than 28 U.S.C. § 1581. As discussed above, subsection 1581(a) does not apply. The only other credible, and indeed the only other argued, possibility is subsection 1581(i). Admittedly, subsection (i) does not specifically refer to disputes concerning the constitutionality of fees such as the HMT. It does, however, specifically refer to the "administration and enforcement with respect to the matters referred to in" the preceding paragraphs, including any law providing for revenue from imports. This dispute does involve the "administration and enforcement" of a law providing for revenue from imports because the HMT statute, although applied to exports here, does apply equally to imports. Additionally, the mere fact that subsection 1581(i) does not speak precisely to this issue and does not use the word

"exports" is not dispositive, as it "was intended to give the Court of International Trade *broad residual authority* over civil actions arising out of federal statutes governing import transactions. ..." *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 18 F.3d 1581, 1588 (Fed. Cir. 1994) (emphasis added).

Thus, in light of the fact that the HMT is a law providing for revenue from imports (as well as exports) and the fact that subsection 1581(i) grants broad residual authority concerning import transactions to the Court of International Trade, the trial court properly asserted jurisdiction over this dispute pursuant to 28 U.S.C. § 1581(i). We must therefore consider whether the trial court correctly held that the HMT, as applied to exports, is unconstitutional.[3]

II.

The United States Constitution provides that:

> No Tax or Duty shall be laid on articles exported from any State.

U.S. Const., Art. I, § 9, cl. 5. The Supreme Court recently analyzed the Export Clause in *United States v. International Bus. Mach.*, — U.S. ——, 116 S.Ct. 1793 (1996). There, the Supreme Court held that the Export Clause does not permit "the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit." *IBM*, 116 S.Ct. at 1795. In other words, even those taxes that are imposed equally on exports and imports or other articles of commerce are prohibited by the Export Clause. *See Id.* at 1803. ("The better reading [of the Export

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[3] We need not and do not address the constitutionality of the HMT statute as applied to anything except exports.

Clause], that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by *completely* denying to Congress the power to tax exports at all.") (emphasis added). Thus, if the HMT is a tax on goods in export transit, it is invalid. We address first whether the HMT is a tax and second whether the HMT is imposed on goods in export transit.

A.

The HMT statute provides:

> (a) General rule.—There is hereby imposed a *tax* on any port use.
>
> (b) Amount of *tax*.—The amount of *tax* imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.
>
> (c) Liability and time of imposition of *tax*.—
>
> (1) Liability.—The *tax* imposed by subsection (a) shall be paid by—
>
> ....
>
> (B) in the case of cargo to be exported from the United States, the exporter....
>
> (2) Time of imposition.—Except as provided by regulations, the *tax* imposed by subsection (a) shall be imposed—
>
> (A) in the case of cargo to be exported from the United States, at the time of loading....

26 U.S.C. § 4461 (1994) (emphasis added). Thus, this statute, at least as it applies to exports, appears to be a prohibited tax on exports in that the tax is imposed based on the value of the exported goods and accrues at the time the goods are loaded on a ship for export. Although the legislative history refers to the HMT as a user fee, the statute itself repeatedly refers to the HMT as a tax and is codified in the Internal Revenue Code.

The government, however, argues that the fact that the HMT is referred to as a tax is not dispositive and that the HMT is actually a user fee, not a tax. The test used to distinguish between taxes and user fees was first articulated in *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707 (1972), and more recently applied in *Massachusetts v. United States*, 435 U.S. 444 (1978). That test states that user fees are valid as such so long as they: (1) do not discriminate against the constitutionally protected interest (here, exports); (2) are based on a fair approximation of use; and (3) are not excessive in relation to the cost to the government of the conferred benefits. *See Massachusetts*, 435 U.S. at 464. We need not decide whether the HMT discriminates against exports or is excessive in relation to the cost to the government of the conferred benefits. Instead, we discuss only whether the HMT is based on a fair approximation of use.

US Shoe argues, and the trial court held, that the HMT is not a fair approximation of the cost of the benefits received by exporters because there is no correlation between the amount of HMT an exporter pays and the amount the exporter uses the port. In other words, the amount of the HMT has no relationship to the size or weight of the vessel or the neces-

sary depth of the port required by the vessel. For example, "[l]ow value bulk cargo importers and exporters use port facilities to a much greater extent than high value non-bulk cargo importers and exporters." *U.S. Shoe*, 907 F. Supp. at 415. Yet, even though the bulk cargo exporters generally require a larger vessel and a deeper port, and therefore "use" the port to a greater extent, they pay a lower tax than high value, low bulk cargo exporters. Moreover, a ship that docks but does not load or unload cargo is not required to pay a fee, even though that ship otherwise utilizes the port. Additionally, there is apparently no correlation between the amount of fees collected at a particular port and the expenditure of funds from the Trust Fund to maintain that particular port. Indeed the trial court found that "most large ports paying the majority of the costs receive no more than 30% back in maintenance expenditures." *Id.* Finally, it is not consistent with a true user fee that so many users are exempted, such as those carrying bunker fuel, ship's stores, equipment necessary for the operation of the vessel and fish and other aquatic animal life not previously landed on shore, 26 U.S.C. § 4462(a) (1994), since ships carrying these products use the port facilities to the same extent as ships carrying products subject to the HMT.

The government argues that the HMT is based on a fair approximation of use and, in support, relies on other cases in which similar *ad valorem* user fees have been upheld. The government first relies on *United States v. Sperry Corp.*, 493 U.S. 52 (1989), where the Supreme Court held that a user fee of 1.5% of all awards recovered from the Iran-United States Claims Tribunal was not an unconstitutional taking but a valid user fee. There, Sperry had argued that

the fee could not be a user fee because it did not bear any relationship to the cost of the tribunal to the United States or the value of the tribunal to Sperry. *Id.* at 60. In rejecting this argument, the Court stated that a user fee need not be "precisely calibrated to the use that a party makes of government services" and need only be a "fair approximation." *Id.* The Court also recognized that, where user fees are applied to a large number of parties, some users will be charged more and some less than in a perfect user-fee system. *Id.* at 61. Here, the government argues that, as in *Sperry*, the fact that the benefits received do not exactly correspond to the amount of the HMT does not render the HMT statute unconstitutional.

We do not find *Sperry* dispositive for two reasons. First, unlike the present case, in *Sperry* the person receiving the award and paying the fee was the direct beneficiary of the process for which they were paying. In other words, parties that had their claims adjudicated by the tribunal or otherwise received the benefit of the tribunal were required to pay the costs of establishing and maintaining the tribunal. Here, on the other hand, as applied to exports, the direct users—the ship owners—do not contribute to the maintenance of the port and it is only indirect users—the export companies—that are required to pay the HMT. Second, the *Sperry* Court, in distinguishing a case holding registration and axle taxes unconstitutional as a violation of the Commerce Clause, stated that the standard applied under the Just Compensation Clause was less strict than that which would be applied in a Commerce Clause analysis where one is concerned about discrimination against interstate commerce. *Id.* at 61 n.7. To this we would add that,

per *IBM*, the Export Clause is still more restrictive. *See IBM*, 116 S. Ct. at 1799 ("Our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the Export Clause is equally fluid. At one time, the Court may have thought that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, but the text did not require that view. The text of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports.") (footnote omitted).

The government also relies on *Alamo Rent-A-Car v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir.1990), where the Eleventh Circuit concluded that an airport access fee enacted to provide funds to maintain the airport and based on a rental car company's gross business receipts was a valid user fee. Alamo argued the fee was not a fair approximation because it bore no relation to Alamo's use of the airport and instead varied in proportion to the revenue generated by Alamo's customers. *Id.* at 520. Alamo argued that its only use of the airport was to drive on the airport roads to pick up customers and that its fee should be limited to a pro rata road use fee. *Id.* at 519. The court disagreed, reasoning as follows:

> Although imprecise in particular applications, the Authority's decision to measure Alamo's use of the airport facility by the gross receipts generated from Alamo's airport customers is not irrational. The Authority could reasonably conclude that the ten percent fee on average represents Alamo's use of the airport facility. It stands to reason that *in general* the more money Alamo makes from airport passengers, the more trips Alamo has made to the airport.

Id. at 520 (emphasis added). Thus, while imprecise, the fee was not unfair or irrational, but was instead a "fair approximation." Again, the payer of the fee in *Alamo* was the direct beneficiary of the use of the airport, unlike here where the exporter is not the direct beneficiary and is not assured harbor maintenance at the harbor where the exporter's goods are loaded. Moreover, in rejecting Alamo's argument that the fee was unreasonable because it was required to pay a greater fee for a person who rented a car for seven days than for a person who only rented a car for one day even though each individual made equal use of the airport, there the court found that the 10% fee was acceptable because it represented, on average, Alamo's use of the airport. *Id.* Here, there is no such finding that the HMT represents, on average, an exporter's use of the port and, as discussed above, the court concluded that the HMT was not based on a fair approximation of use, thereby implicitly finding that the HMT did not represent, on average, an exporter's use of the port.

The government also argues, without providing any support, that by using the words "fair approximation of use" the Supreme Court in *Massachusetts* intended to refer to the *value* of the benefits received, rather than the *costs* of the benefits received. The government then asserts that the HMT is a fair approximation of the value of the benefits received because the profitability of higher value cargo is higher than for lower value cargo. We do not agree. First, the *Massachusetts* case itself suggests that the cost of the benefits, rather than the value, is the appropriate

measure in its statements that "Congress believed that four measures, taken together, would fairly reflect some of the *cost* of the benefits" and "the present scheme nevertheless is a fair approximation of the *costs* of the benefits each aircraft receives." 435 U.S. at 468 (emphasis added). Second, higher value merchandise does not always correlate to a higher profit margin and the government has failed to present any facts that would suggest that, even on average, this is the case. Thus, exporters of higher value goods do not necessarily receive a greater benefit, even in terms of value, than exporters of lower value goods. Third, the exporters are forced to pay for harbor maintenance across the entire country, even though they receive no benefit from maintained harbors at any port other than the one they actually use. Fourth, the HMT does not pay for services, such as police, fire or rescue units, that provide benefits to the exporters by keeping the harbors safe whether the exporters use those services or not. *See Maine v. Department of Navy*, 973 F.2d 1007, 1014 (1st Cir. 1992) (refusing to grant summary judgment that fee used to pay for a hazardous waste spill response team was not based on a fair approximation of use because, even though the Navy had not yet needed the team, it was available to minimize any future spill at the shipyard).[4] Therefore, even if the value of the benefits received is an accurate measure, we hold that the HMT is not a fair approximation of the value of the benefits received by the exporters.

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[4] Notably, in this case the appellate court rejected the Navy's argument that the measure of the authorized fee for services is the value to the recipient. *See Maine*, 973 F.2d at 1014.

We therefore hold that the HMT is not based on a fair approximation of use and, as such, is not a permissible user fee. Although the decision to impose the HMT on an *ad valorem* basis may have substantially reduced administrative costs and burdens, it is nevertheless not based on a fair approximation of use. Since the HMT is not a valid user fee, it must be a tax.

B.

The government also argues the HMT is not levied against exported articles and, therefore, even if it is a tax, it is not unconstitutional. Rather, according to the government, the fee is imposed on the use of federally maintained harbors by shippers,[5] exporters[6] and importers[7] of commercial cargo, regardless of destination, and is even imposed on the transportation of passengers. Thus, according to the government, the HMT is "an ordinary burden of taxation" rather than a tax or duty imposed on "exported articles."

We do not agree. The Constitution prohibits taxation of articles in the course of being exported. *See A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 69 (1923) ("The fact that the law under which the tax was imposed was a general law touching all sales of the

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[5] Shippers, i.e., the persons or corporations that pay the freight, are responsible for paying the HMT on commercial shipments within the United States. *See* 19 C.F.R. § 24.24(e)(1)(i) (1996).

[6] Exporters, i.e., the persons or corporations whose name appears on the SED document or the equivalent document, are liable for the HMT on exports. *See* 19 C.F.R. § 24.24(e)(2)(i) (1996).

[7] Importers are liable for the HMT on imports. *See* 19 C.F.R. § 24.24(e)(3)(i) (1996).

class, and not aimed specially at exports, would not help the defendant if in this case the tax was 'laid on articles exported from any State,' because that is forbidden in terms by the Constitution."). Thus, while a tax may be constitutional if imposed on goods during the manufacturing process, even if they are intended for later export, a tax is not constitutional if imposed on those very same goods after they are loaded on a vessel for export or if imposed when delivered to the carrier for export. *See id.* (holding unconstitutional a tax on baseball bats and balls imposed on "[t]he very act that passed the title and that would have incurred the tax had the transaction been domestic, [and that] committed the goods to the carrier that was to take them across the sea, for the purpose of export and with the direction to the foreign port upon the goods."). Here, the HMT is imposed on an *ad valorem* basis at the time the exported goods are loaded on the vessel, rather than at some prior point in time when the goods are not yet bound for export. The exporter, rather than the manufacturer, pays the tax. In the absence of the export act of loading the goods, and in the absence of the exporter's documents required for that act, the HMT would not be owed and no amount could be determined because the HMT is incurred at the time of loading, 26 U.S.C. § 4461(c)(2)(A), and is based on the value of the goods as determined by the standard commercial export documentation, 26 U.S.C. § 4462(a)(5)(A). *See also* 19 C.F.R. § 24.24(e)(2)(i) ("The fee is based upon the value of the shipment loaded as required to be indicated on the SED or equivalent documentation."). Thus, we conclude that the HMT, as applied against U.S. Shoe, is imposed on exports.

C.

The government makes several additional arguments in support of the constitutionality of the HMT. First, the government argues that the Export Clause is distinct from the Commerce Clause and, consequently, Congress may impose a tax or duty pursuant to its authority to regulate commerce, so long as the purpose of the tax or duty is not to raise revenue for the general welfare. *See Armour Packing Co. v. United States*, 209 U.S. 56, 79 (1908) ("But it is to be observed that the Constitution provides for a burden only by the way of taxation or duty, and, unless the alleged interference amounts to such taxation or duty, it does not come within the constitutional prohibition."). Thus, according to the government, the relevant inquiry is whether the HMT was enacted pursuant to Congress' authority to regulate commerce, not whether it imposes a burden on exports. *See New Orleans Steamship Ass'n v. Plaquemines Port, Harbor and Terminal Dist.*, 874 F.2d 1018, 1021-22 (5th Cir. 1989) (holding that a port could impose reasonable fees against ships to finance emergency response services). Second, the government argues that the trial court adopted an overly broad interpretation of the Export Clause because it failed to recognize that the sole purpose of the Export Clause was to prevent the northern states from crippling the export-dependent southern states—not to restrict Congress' authority to impose nondiscriminatory fees designed to recoup costs.

We do not agree. The Supreme Court recently reaffirmed the breadth of the Export Clause in the face of the argument that its historical purpose justified a narrow construction. *IBM*, 116 S.Ct. at 1803 ("While

the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language."). Moreover, the power to regulate commerce cannot completely override the effect of the Export Clause. *See North Am. Co. v. SEC*, 327 U.S. 686, 704-05 (1946) ("This is not to say, of course, that Congress is an absolute sovereign. It is limited by express provisions in other parts of the Constitution, such as section 9 of Article 1 and the Bill of Rights."); *see also IBM*, 116 S.Ct. at 1798 (rejecting government's request to "reinterpret the Export Clause to permit the imposition of generally applicable, nondiscriminatory taxes as [the Court has] under the Commerce Clause. . . ."). It is undeniable that Congress may regulate commerce by means such as encouraging or discouraging certain actions using regulatory charges to achieve compliance. *See South Carolina v. Block*, 717 F.2d 874, 887 (4th Cir. 1983) (imposition of a 50-cent deduction on proceeds of all milk sold commercially is constitutional where "[t]he clear language and structure of the [statute] indicates that its primary purpose is regulation" and the "purpose is to reduce overproduction of milk and shift some of the financial burden of the price support system."). Likewise, it is beyond dispute that Congress may raise money to recover the expenses of a regulatory program. *See, e.g., New Orleans*, 874 F.2d at 1021-22 ("[C]ourts have consistently held that ships may be made to pay for services they get.").

It is, however, also beyond dispute that Congress cannot merely impose a direct economic burden on merchandise for export in the absence of regulation.

See IBM, 116 S. Ct. at 1798-99 (rejecting the government's argument that the Commerce, Import-Export and Export Clauses should be read in harmony to permit the imposition of generally applicable, nondiscriminatory taxes on exports). That is the case here. The government has failed to point to any indication that the HMT is intended to regulate commerce. Indeed, it appears that the HMT regulates nothing. It is not designed to reduce the overall use of the ports. *See Block*, 717 F.2d at 887. Rather, the HMT merely increases the cost of exporting by raising money to maintain the harbors in a manner that is not reasonably connected to the exporter's use of the harbors, and is therefore unconstitutional. Additionally, the government has not persuaded us that the HMT is designed to simply recoup the costs of the services, e.g., port maintenance, provided by the government because the sums paid by the exporter have no reasonable relationship to the cost or the value of the services received by the exporters, and the exporters are not even the direct beneficiaries of the services. Moreover, the mere fact that Congress may have attempted to exert its power under the Commerce Clause, as opposed to the Tax Clause, as evidenced by the fact that the HMT is not designed to raise money for the general welfare, is not dispositive. *See Moon v. Freeman*, 379 F.2d 382, 390-91 (9th Cir. 1967) (stating that the "test for determining when a monetary imposition nominally imposed under the commerce power should be considered an exercise of the power to raise revenue and therefore [be] barred by the export clause" is "to view the objects and purposes of the statute as a whole and if from such examination it is concluded that revenue is the primary purpose and regulation merely incidental, the imposition is a tax

and is controlled by the taxing provisions of the Constitution."). The HMT, in fact, does not regulate or facilitate commerce and is, in effect, a tax. Therefore, as to exporters at least, the HMT is not an appropriate use of Congress' power to facilitate and regulate commerce.

New Orleans is distinguishable because there the fees were not assessed based on the value of the goods but were based on the benefit of services such as pilotage, towage and wharfage as measured by the size or weight of a vessel and paid by those benefiting from the service. 874 F.2d at 1020 (fees based on the number of days in port, the length of the vessel, and whether the ships load or unload cargo). Thus, the fees were based on the services received during port use. *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935), also relied on by the government, is similarly distinguishable. There, the State Docks Commission, a state agency, imposed a fee on all vessels of a certain size that entered the port and vessel operators alleged that the fee violated the constitutional provision prohibiting imposition of duties of tonnage by states. *Id.* at 262-63. The fee was designed to reimburse the agency for the costs of policing the harbor. *Id.* at 264. There, however, the parties agreed that the fee was reasonable. *Id.* at 263. Here, the parties have not reached any such agreement, and, as we conclude above, the fee is not reasonable. Moreover, there the vessel operators—the direct beneficiaries of the agency's policing actions—paid the fee. *Id.* Furthermore, all such operators received the benefits for which they paid. *Id.* at 266 ("It is not any the less a service beneficial to appellant because its vessels have not been given any special assistance. The benefits which flow from the enforcement of regulations,

such as the present, to protect and facilitate traffic in a busy harbor inure to all who enter it."). Finally, the statute at question in that case also had a regulatory effect "plainly devised to insure the safety of vessels and to facilitate their use of the harbor." *Id.* at 264. Here, there is no such effect. The HMT does not ensure vessel safety, but was designed to cover the costs of dredging the harbors. *See* S. Rep. No. 99-126 at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647.

Finally, certain of the amici, given leave to file briefs here, argue that, because the HMT is unconstitutional and therefore void *ab initio*, all monies collected since the implementation of the HMT should be refunded. As US Shoe does not seek such recovery, there is no need for us to reach this issue. Similarly, we do not reach the issue of whether the HMT violates the Port Preference Clause because it is not necessary to our disposition of this appeal.

CONCLUSION

We conclude that the trial court properly exercised jurisdiction pursuant to 28 U.S.C. § 1581(i). Because Customs merely receives the funds from the exporters and transfers the funds to the Trust Fund without exercising any discretion, performing any analysis, calculating any amounts or issuing any decision or order, there was no Customs' "decision" for US Shoe to protest, and jurisdiction therefore could not be proper under 28 U.S.C. § 1581(a). Moreover, because the HMT is a tax, as opposed to a user fee, directly imposed on goods in export transit, we conclude that the HMT statute, as applied to exports, violates the Export Clause and is therefore invalid to the extent it applies to exports. Therefore, the trial court properly (1) granted summary judgment that

the HMT statute was unconstitutional, (2) enjoined the government from collecting further HMT on exports, and (3) ordered it to refund the HMT amounts paid by U.S. Shoe for the period assessed in the complaint. Accordingly, the judgment of the Court of International Trade is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

No. 96-1210

UNITED STATES SHOE CORPORATION,
PLAINTIFF-APPELLEE

v.

THE UNITED STATES, DEFENDANT-APPELLANT

MAYER, *Circuit Judge*, dissenting.

Because in my view the Harbor Maintenance Tax (HMT) is a user fee, it does not violate the Export Clause of the Constitution.

Statutes are presumed constitutional. *Fairbank v. United States*, 181 U.S. 283 (1901). We must "not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Indeed, courts must strive to avoid constitutional questions. *See NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500-01 (1979) (courts are required to choose any reasonable construction of a statute that would eliminate the need to confront a contested constitutional issue); *Hooper v. California*, 155 U.S. 648, 657 (1895) (courts must resort to "every reasonable construction . . . in order to save a statute from unconstitutionality"). Thus, "where an otherwise acceptable construction of a statute would raise serious constitutional problems,

the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

In light of these mandates, the question is whether the HMT is a tax or duty within the proscription of the Export Clause or whether it is a permissible user fee. Generally, a tax is enacted to raise revenue "to go to the general support of the government," *see Head Money Cases*, 112 U.S. 580, 596 (1884), while a user fee is designed as a specific charge for the use of government facilities and services, *see Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 621 (1981). If it is the latter, we avoid the sticky question whether the assessment violates the Export Clause. So, we must construe the HMT as a user fee, if reasonable to do so, unless it is "plainly contrary to the intent of Congress." *DeBartolo*, 485 U.S. at 575.

Congress thought it was enacting a user fee. It is true that the statute calls the HMT a tax and that it resides in the Internal Revenue Code. It is equally true, however, that the HMT is levied on "port use." The label is not dispositive; we must dig deeper. *See Head Money Cases*, 112 U.S. at 595-96 ("[T]he act is not void because, within a loose and more extended sense than was used in the Constitution, it is called a tax."); *Pace v. Burgess*, 92 U.S. 372, 375 (1875); *see also Fairbank*, 181 U.S. at 304 (courts analyze things, not names).

"In determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *See Crandon v. United States*, 494 U.S. 152, 158 (1990). The object and policy of the HMT help to reveal its true identity. The Senate Report

states: "The taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and taxes offset services rendered to vessels. The provision of a new, deeper channel is as much a service rendered to the shipper as pilotage, dockage, or wharfage."[1] S. Rep. No. 99-126, at 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644. The House Report similarly states that the HMT is "a *charge on use* by a commercial vessel of a harbor or channel ('port') in the United States for the loading or unloading of commercial cargo on or from the vessel." H.R. Rep. No. 99-228, at 1 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6706 (emphasis added). In fact, the legislative history refers repeatedly to the HMT as being based on use. *See, e.g., id.* at 1, *reprinted in* 1986 U.S.C.C.A.N. at 6706 ("Harbor (Port) User Charges"); H.R. Conf. Rep. No. 99-1013, at 228 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6723, 6740 ("Port Use Tax"); S. Rep. No. 99-126, at 2, *reprinted in* 1986 U.S.C.C.A.N. at 6640 ("user taxes"); *id.* at 135, *reprinted in* 1986 U.S.C.C.A.N. at 6705 (additional views of Sen. Lautenberg) ("user fee").

Moreover, the HMT was enacted as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (Act), "comprehensive" legislation that addressed myriad problems in the federal water resources development program. *See* S. Rep. No. 99-126, at 3, *reprinted in* 1986 U.S.C.C.A.N. at 6641. "Historically, the Federal Government ha[d] financed the full cost of designing, constructing,

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[1] Charges for harbor services like pilotage, wharfage, and dockage are permissible. *See generally Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935).

rehabilitating, maintaining, and operating the . . . coastal harbors of the United States." *Id.* at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6643-44. Yet, the law did not "impose Federal user fees or charges on the beneficiaries of these expenditures." H.R. Rep. No. 99-228, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6709. Congress found that traditional harbor maintenance policy would "not meet national needs" because it was "unlikely that the Federal Government [would] finance the construction of such port improvements." S. Rep. No. 99-126, at 8, *reprinted in* 1986 U.S.C.C.A.N. at 6646. As the House Report explains: "[A]dditional Federal investment is needed for operations and maintenance of U.S. channels and harbors (ports) in order to improve and maintain such ports for waterborne commerce. Such additional investment in U.S. ports will facilitate economic development and make the Nation's water transportation system more efficient." H.R. Rep. No. 99-228, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6709.

Importantly, Congress found that these needs were "clearly *commercial*." S. Rep. No. 99-126, at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6644 (emphasis added). It decided "that a portion of Federal expenditures needed for port operations and maintenance should be borne by the *direct beneficiaries* of such expenditures," commercial users. H.R. Rep. No. 99-228, at 5, *reprinted in* 1986 U.S.C.C.A.N. at 6709 (emphasis added). Congress targeted commercial users to help shoulder the fiscal burden of operations and maintenance costs for harbors and inland waterways because they are the parties who enjoy their benefits. The government "has an obvious interest in making those who specifically benefit from its services pay the cost." *Massachusetts v. United States*, 435 U.S. 444, 462 (1978).

One of Congress' primary difficulties, however, was deciding how to craft a user fee to "help defray the costs of maintaining new harbors deeper than 45 feet."[2] S. Rep. No. 99-126, at 10, *reprinted in* 1986 U.S.C.C.A.N. at 6647. "In recent years, the Committee considered a variety of proposals involving harbor maintenance. These ranged from diverting a portion of customs revenues for harbor work to port-by-port maintenance fees to more studies. The debate in some cases is between high maintenance harbors and low maintenance harbors; in others it is between large ports and small ports; or between bulk cargo and containerized cargo ports." *Id.* at 9, *reprinted in* 1986 U.S.C.C.A.N. at 6646. In fact, the Senate Subcommittee on Water Resources held twenty-six hearings over three Congresses and more than four years on the Act. *Id.* at 116, *reprinted in* 1986 U.S.C.C.A.N. at 6688. Ultimately, it opted to impose a nationally-uniform fee on the "value of the cargo passing through harbors." *Id.* at 9, *reprinted in* 1986 U.S.C.C.A.N. at 6646; *see also id.* at 111-12, *reprinted in* 1986 U.S.C.C.A.N. at 6684. The House Report explains that "the ad valorem basis of the charges is

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[2] Very few bays and estuaries have natural depths greater than 20 feet. S. Rep. No. 99-126, at 7, *reprinted in* 1986 U.S.C.C.A.N. at 6645. Yet the size of vessels has so increased that harbors forty-five feet deep are now "inadequate for many fully loaded tankers." *Id.* at 8, *reprinted in* 1986 U.S.C.C.A.N. at 6645. Congress found that the constraints of these shallow harbors "add to the costs of importing crude oil and petroleum products," and that "[d]eeper draft harbors would facilitate the export of U.S. coal and, eventually, other bulk commodities, such as grain and ores." *Id.*

the only acceptable basis on which to impose such charges. This national, uniform basis minimizes any possible competitive disadvantages among cargo types and U.S. ports which otherwise might result from user charges." H.R. Rep. No. 99-228, at 5-6, *reprinted in* 1986 U.S.C.C.A.N. at 6710.

Critically, Congress mandated that fees collected from the HMT be used only for commercial navigation projects.[3] Monies in the Harbor Maintenance Trust Fund (HMTF) may be used only to pay (1) for the operations and maintenance costs of the United States portion of the St. Lawrence Seaway, and for the eligible operations and maintenance costs "assigned to *commercial* navigation of all harbors and inland harbors within the United States," 33 U.S.C. § 2238(a) (1994) (emphasis added), *referenced* in 26 U.S.C. § 9505(c)(1) (1994); and (2) for all of the expenses of administering the HMT incurred by the Departments of Treasury and Commerce and the U.S. Army Corps of Engineers, up to $5,000,000 per fiscal year, 26 U.S.C. § 9505(c)(3).[4] So, HMT charges, collected from commercial users, may only be expended for harbor operations and maintenance costs incurred on their behalf.

The government has been true to this constraint. In its initial report to Congress on the HMTF's

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[3] Interest earned on monies in the Harbor Maintenance Trust Fund (HMTF) also remains in the fund.

[4] 26 U.S.C. § 9505(c)(2) permits monies in the fund to be used to pay rebates of tolls or charges levied for use of the St. Lawrence Seaway, as required by 33 U.S.C. § 988a. Section 988a was amended in 1994, however, to waive the collection of tolls or charges on commercial vessels, instead of requiring commercial users to pay the toll or charge and then obtain a rebate. Pub. L. No. 103-331, § 339(a), 108 Stat. 2496.

status, the government explained that operations and maintenance costs for commercial navigation were accounted for in the "Corps of Engineers Management Information System." *First Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Years 1987—1992* at 2, ¶ 6 [hereinafter *First Report*]. In deciding which expenditures were reimbursable, the government recognized that some projects have both a "commercial navigation" purpose and some other purpose, such as recreation, hydropower, or flood control. *Id.* at 3, ¶ 7. All operations and maintenance expenditures made for single purpose commercial navigation projects were considered subject to reimbursement from the HMTF. *Id.* In contrast, on joint purpose projects, the government allocated costs to the project's different purposes in proportion to the benefits realized for each purpose, recovering only the commercial navigation costs. *Id.*; *see also Second Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1993* at 1-2, ¶ 4 (indicating continued compliance) [hereinafter *Second Report*]. This ensures that HMT funds collected from commercial users are spent for their benefit.

In sum, it surely does not violate Congress' intent to construe the HMT as a user fee. The question is whether it is reasonable to interpret it that way. In analyzing whether a particular charge constitutes a user fee, the Court has asked whether it: (1) discriminates against the constitutionally-protected interest; (2) is based on some fair approximation of the use of some system; and (3) is structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. *Massachusetts*, 435 U.S. at

464; *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707, 716-17 (1972).

First, the HMT does not discriminate against exporters. Indeed, the trial court did not hold to the contrary; it simply bypassed the issue and ruled the HMT a tax based on the second and third prongs of the *Massachusetts* test. The HMT is levied against commercial users of United States ports and harbors, including exporters, importers, domestic shippers, and passenger carriers (except ferries, as defined). Congress found these groups to be the principal beneficiaries of harbor operations and maintenance projects. It also required that HMT monies be expended only for their benefit. That the statute exempts some harbor users from payment does not render the HMT discriminatory against exporters. Some exempted users, like recreational users, do not and would not benefit from operations and maintenance projects funded by the HMT because those projects are commercial in nature. Requiring such users to pay the fee would be unfair. Congress made reasonable policy decisions to exempt other users, such as nonprofit organizations transporting humanitarian and development assistance cargo. 26 U.S.C. § 4462(h); *see also id.* § 4462(b) (exempting cargo transported within Alaska, Hawaii, or any United States possession, or between those locales and the United States mainland "because of the high dependence of these islands' economies on waterborne commerce." H.R. Rep. No. 99-228, at 6, *reprinted in* 1986 U.S.C.C.A.N. at 6710). These exemptions do not compromise the HMT's non-discriminatory status.

Second, the HMT is based on a fair, if imperfect, approximation of exporters' use of, or privilege to use, United States harbors and ports. When the government "applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system." *United States v. Sperry Corp.*, 493 U.S. 52, 61 (1989). "Perfect uniformity and perfect equality of taxation, in all the respects in which the human mind can view it, is a baseless dream." *Head Money Cases*, 112 U.S. at 595. Consequently, the amount of a user fee need not be "precisely calibrated to the use that a party makes of Government services." *Sperry*, 493 U.S. at 60.

The government concedes that the HMT, like most user fees, is imperfect, but contends that it is a fair approximation of use. U.S. Shoe argues, and the court held, that this is wrong for four primary reasons: (1) all harbor users do not pay the fee, (2) there is no correlation between the charges collected at a particular port and expenditures for that port's maintenance and operations, (3) low-value, bulk cargo importers and exporters use the port facilities to a greater extent than high-value, non-bulk cargo importers and exporters yet pay lower fees, and (4) the ad valorem nature of the fee does not accurately measure use. The first three, of course, are the precise concerns with which the legislature wrestled over three Congresses and more than four years. The fourth challenge is to what Congress found to be "the only acceptable basis on which to impose such charges" because it was "uniform" and "minimizes any possible competitive disadvantages among cargo types and U.S. ports which otherwise might result from user charges." H.R. Rep. No. 99-228, at 5-6, *reprinted in* 1986 U.S.C.C.A.N. at 6710. "This was obviously the judgment of Congress and we [should]

abide by it." *Sperry*, 493 U.S. at 62, 110 S.Ct. at 395. Notwithstanding, I address each issue in turn.

For the same reasons that the HMT is not discriminatory, the fact that all users of our harbors and ports do not pay the fee does not mean it is an unfair approximation of use by those against whom the assessment is levied. *See Evansville*, 405 U.S. at 717-18 (upholding a user fee as a fair approximation of the use of the facilities for whose benefit they are imposed even though "a majority of the actual number of persons who use facilities of the airports involved" were exempt, because the exemptions were not "wholly unreasonable"). Nor is there merit to U.S. Shoe's second argument that because fees collected at a particular port are not necessarily expended for operations and maintenance at that port, the fee is not a fair measure of use. This is an overly narrow view. Users do not benefit only from access to the particular ports they use. Every exporter has all ports and harbors available to it. Those that never use certain ports benefit from them "in the sense that [they] are available for their use if needed and in that" the provision of better harbor maintenance services "makes the [ports] safer for all users." *Massachusetts*, 435 U.S. at 468; *see also Sperry*, 493 U.S. at 63.

Finally, U.S. Shoe's related third and fourth arguments do not establish that the HMT is not a fair approximation of use. Initially, there is great irony in the argument that the charge is unfair because high-value, non-bulk cargo carriers are assessed higher fees than low-value, bulk cargo shippers, yet allegedly "use" harbors to a lesser extent. Exporters generally ship low-value cargo, such as grain and coal, which is transported in bulk. *See First Report* at 3, ¶ 9. Importers, on the other hand, tend to ship

high-value cargo, like electronics and automobiles, which is not shipped in bulk. *Id.* Consequently, exporters are generally assessed lower fees than importers, yet they purportedly "use" the harbors to a greater extent because of the bulk nature of their shipments. Thus, it is the exporters themselves who allegedly are not bearing their fair share.

In addition to the irony, U.S. Shoe's argument is unpersuasive. First, not all bulk cargo is of low value, nor, undoubtedly, is all non-bulk cargo of high value. For example, some "high value" commodities, such as "petroleum," are transported in bulk. *Id.* Thus, to say that the HMT is unfair because low-value cargo carriers use ports to a greater extent than high-value cargo carriers is not wholly accurate. Second, even if a high-value cargo shipper never requires the use of harbors deeper than forty-five feet, there is nothing in the record to support the notion that the only operations and maintenance projects undertaken with HMTF monies are deep-harbor dredging. Indeed, U.S. Shoe does not argue that projects financed with HMTF monies are so limited. While projects are limited to those that inure to the benefit of commercial users, the government has discretion to decide which projects those are. That some users, like exporters, transport some bulk products of lower value than some non-bulk products transported by other users, does not make the HMT a tax. Nor does its ad valorem structure.

It is beyond dispute that an ad valorem charge can be a user fee. *See Sperry*, 493 U.S. at 59-64; *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990); *see also Alamo Rent-A-Car, Inc. v. City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992). Notwithstanding, U.S. Shoe attempts

to distinguish *Sperry* and *Alamo* on the ground that the parties assessed the user fees in those cases were direct beneficiaries of the provided services. Here, it argues, the direct beneficiaries are the vessel owners, not the importers and exporters who pay the fee. There are two problems with this argument. First, it flies in the face of Congress' finding that exporters are the direct beneficiaries. Congress decided that a portion of federal expenditures needed for port operations and maintenance should be borne by the *direct beneficiaries* of such expenditures, among whom it obviously included exporters and importers. Second, the Court rejected a similar argument in *Evansville*. There, it held that it is not "particularly important whether the charge is imposed on the passenger himself, to be collected by the airline, or on the airline, to be passed on to the passenger if it chooses." 405 U.S. at 714. Similarly, here it is unimportant whether the fee be assessed against exporters and importers, the ultimate beneficiaries of the harbor maintenance and operations projects, or against the actual vessel owner, to be passed on to the importers or exporters if it chooses.

Finally, the HMT is structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. The relevant inquiry is whether Congress *structured* the HMT so that the monies collected under it are "fairly apportioned" to the government's cost of providing commercial harbor maintenance services. U.S. Shoe argues, and the trial court held, that the HMT fails this prong for two primary reasons: (1) it funds projects yet to be commenced rather than reimbursing the government for completed projects, and (2) the HMTF has accumu-

lated a large surplus. The first objection is misplaced; the second, while troubling, is unavailing.

Regardless of the factual accuracy of U.S. Shoe's first concern,[5] when viewed in light of the purposes for which the HMT was enacted, it is of little relevance that HMT monies might fund port operations and maintenance projects not completed, or even initiated, at the time of collection. The HMT is not a short-term fix to the myriad problems that plague our nation's waterborne commerce. It is a long-term vehicle to improve and to maintain the harbors for the continuing benefit of United States commerce. Indeed, Congress expressly found that the fee will facilitate economic development. "[A] surplus of revenue over outlays in any one year can be offset against actual deficits of past years and *perhaps against projected deficits of future years.*" *Massachusetts*, 435 U.S. at 470 n. 25 (emphasis added). The Eleventh Circuit has also recognized that user fees may be expended on future projects. In *Alamo*, it held that "given the long term nature of maintaining and developing an airport, it was appropriate . . . to factor in future development plans when setting user fees." 906 F.2d at 522. Thus, it is of little moment that HMT monies are purportedly expended to fund projects not

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[5] The *First Report* states that "the actual transfer of funds from the [HMTF] is for expenditures made in the previous fiscal year. In other words, FY 1990 expenditures are shown as transfers from the [HMTF] in FY 1991, and so forth. Corps expenditures are never made directly from the [HMTF], nor are transfers made on the basis of estimates or projections." *First Report* at 3, ¶ 7. This indicates that FY 19xx projects are reimbursed from the HMTF with FY 19xx, or perhaps surplus, funds in FY 19xx+1.

yet started rather than to repay the government for services that have already been rendered.

Similarly, the fact that the HMTF enjoys, or perhaps suffers, a large surplus does not resolve whether Congress structured the HMT as a tax or a user fee. To be sure, the substantial surplus weighs against finding the HMT a user fee. But this does not, of itself, render it a tax. A closer look reveals that the HMT's structure was not ill-conceived. From 1987 through 1990, during which the HMT was only 0.04% ad valorem and paid just 40% of eligible Corps costs, revenues and expenditures were closely aligned. *See First Report* at 6, ¶ 13. For example, in FY 1988, HMTF expenditures actually *exceeded* revenues by approximately $6 million, and the ending balance was just $9 million. *Id.*

Trouble began in 1991, when Congress increased the ad valorem rate to 0.125% in order to fund 100% of eligible Corps expenses and to reimburse the National Oceanic and Atmospheric Administration (NOAA) $45.5 million for its annual commercial navigation costs. While the revenue generated under the higher rate was only slightly less than projected, expenditures were considerably less, resulting in a growing HMTF surplus. Withdrawals from the HMTF were less than anticipated due primarily to (1) the absence of legislation authorizing NOAA to receive its commercial navigation costs, (2) the fact that the Corps' operations and maintenance budget was lower than had been projected in 1990 when the new ad valorem rate was established, and (3) withdrawals from the HMTF for improved administration and enforcement, while authorized, remained unappropriated. *See, e.g., Second Report* at 5, ¶ 10.

The surplus has certainly burgeoned in recent years as a result of these unforeseen decreases in projected expenditures, but that does not mean that the HMT's structure shows it to be a tax. Congress is not prescient. In fact, the government recognizes that this is a problem about which something must be done. *See Third Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1994* at 7, ¶ 16 ("The growing surplus in the HMTF remains. This can only be corrected by widening the authorized uses for HMTF monies, or by reducing the HMF [sic] to a level consistent with its annual expenditures."). Congress has already amended the HMT statute once. There is no reason to believe that it will not correct the growing surplus. Until then, commercial users know that all HMT monies plus interest may only be expended for harbor operations and maintenance projects with commercial purposes. They may not be used for the general support of the government. *See Northwest Airlines, Inc. v. County of Kent*, 510 U.S. 355, 371-72 (1994) (declining to decide whether an airport user fee, which had accumulated "huge surpluses," was excessive under *Evansville*, in part because all fees collected had to be expended for the airport's capital or operating costs, and the airlines challenging the fee had not suggested that the surplus was being used for any purpose other than airport-related expenses); *Head Money Cases*, 112 U.S. at 596 (charges imposed on shipowners for each immigrant they brought into the United States, which were deposited into an "immigrant fund" appropriated in advance for the temporary care of passengers whom shipowners transported, was not a tax).

I would reverse the judgment of the Court of International Trade.

APPENDIX B

UNITED STATES COURT OF INTERNATIONAL TRADE

Slip Op. 95-173

Court No. 94-11-00668

UNITED STATES SHOE CORP., PLAINTIFF

v.

UNITED STATES, DEFENDANT

[Oct. 25, 1995]

OPINION

Before: DiCARLO, Chief Judge and RESTANI and MUSGRAVE, JJ.

DiCARLO, Chief Judge:

Article I, Section 9, Clause 5 of the United States Constitution (the "Export Clause") provides "[n]o Tax or Duty shall be laid on Articles exported from any State." The question presented is whether the Harbor Maintenance Tax, 26 U.S.C. §§ 4461-62 (1988 & Supp. V 1993) (Internal Revenue Code) [hereinafter "Tax"], when imposed upon merchandise exported from the United States, violates this prohibition. The court concludes that it does.

I

This case comes before the court on cross-motions for summary judgment pursuant to USCIT Rule 56. The parties agree there are no material facts in dispute. They also agree that the court has subject-matter jurisdiction to determine the constitutionality of the Tax.

Congress has given the Court of International Trade jurisdiction over matters arising out of the Tax: "For purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. § 4462(f)(2). This language directs that taxes imposed upon both imports and exports shall be treated as if they were customs duties, in other words, as import transactions.

Congress's purpose in centralizing jurisdiction over import transactions in the Court of International Trade was to dispel the jurisdictional confusion existing as to the Court of International Trade's predecessor, the Customs Court, and to reflect the true scope of the court's jurisdiction. *See* H.R. Rep. No. 1235, 96th Cong., 2d Sess. 47 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3729, 3758-59. As the legislative history of the Customs Courts Act of 1980 shows, Congress sought, by permitting a single court to hear these suits, "to eliminate much of the difficulty experienced by international trade litigants who in the past commenced suits in the district courts only to have those suits dismissed for want of subject matter jurisdiction." H.R. Rep. No. 1235, at 47, 1980 U.S.C.C.A.N. at 3759. Accordingly, Congress

granted the court exclusive jurisdiction over *any* civil action against the United States arising out of federal laws governing import transactions, because of the court's "already developed expertise in international trade and tariff matters." *Conoco, Inc. v. United States Foreign-Trade Zones Bd.*, 12 Fed.Cir. (T) ——, ——, 18 F.3d 1581, 1586 (1994). This authority includes the inherent responsibility to review challenges to the constitutionality of a law within that area of expertise. *See* 28 U.S.C. §§ 251, 1331, 1585 (1988) (providing this court with all powers of U.S. district courts including original jurisdiction over actions arising under Constitution); *see, e.g.*, 28 U.S.C. § 255(a)(1) (1988) (permitting designation of three-judge CIT panels to hear and determine constitutional issues). In addition to the statutory language, the legislative history of the Tax supports this court's jurisdiction. S. Rep. No. 228, 99th Cong., 1st Sess. 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6715.

Finally, this is not the first case where the court has taken jurisdiction over matters arising from the Tax; the court recently exercised jurisdiction over claims for restitution of taxes paid by passenger liners pursuant to the Tax in *Carnival Cruise Lines, Inc. v. United States*, 18 CIT ——, 866 F. Supp. 1437 (1994). In sum, in light of the Tax's plain language, its legislative history and the Court of International Trade's traditional role as the proper forum for review of actions governing import transactions, the court possesses jurisdiction to hear and determine the constitutionality of the Tax.

II

Congress established the Tax as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082 (codified as amended in scattered titles of U.S.C.) [hereinafter the "Act"]. While it named the charge imposed upon port users a "tax," 26 U.S.C. ch. 36, subch. A, this nomenclature is not necessarily binding on the court, *see Fairbank v. United States*, 181 U.S. 283, 304, 21 S.Ct. 648, 656, 45 L.Ed. 862 (1901) ("we must regard things rather than names"). The provisions of the Act, including the Tax, are severable. Water Resources Development Act § 949, 33 U.S.C. § 2304 (1988).

The Tax imposes an *ad valorem* tax on "any port use" of federally-maintained navigable waterways. 26 U.S.C. §§ 4461, 4462(a)(2). The statute defines "port use" as "the loading [and] unloading of commercial cargo [on or] from[ ] a commercial vessel at a port," 26 U.S.C. § 4462(a)(1), and "port" as any channel or harbor open to public navigation that is not an inland waterway, 26 U.S.C. § 4462(a)(2)(A). The Tax is applied against imports and exports, and domestic shipments, as well as passengers. 26 U.S.C. §§ 4461(c)(1), 4462(a)(3)(A). Presently, the amount of the Tax imposed is 0.125 percent of the value of the commercial cargo involved. 26 U.S.C. § 4461(b) (Supp. V 1993). This is without regard to the size of the vessel, the manner or extent of use of port facilities, or the condition of the particular port. For passengers, the statute calculates value based on the actual charge paid for the transportation. *See* 26 U.S.C. § 4462(a)(5)(B). Further, Congress does not distinguish among port users or particular ports

in expending funds for harbor maintenance or operations, even though some ports or users may contribute the majority of the fees paid.

The Tax exempts certain cargo and passengers from its burden. These exemptions include fish or other aquatic animals not previously landed on shore, ferry passengers, bunker fuel, ships' stores, or equipment necessary for operation of a vessel, bonded commercial cargo entering the United States for transhipment to a foreign country, and any cargo shipped between the continental United States and Alaska, Hawaii or any U.S. possession for ultimate consumption at its destination with the exception of crude oil transported from Alaska. 26 U.S.C. § 4462. The Tax also exempts intraport movement of cargo, recreational and *de minimis* port use, port use by the U.S. government, and humanitarian and development assistance cargo. *Id.* Congress's stated purpose in enacting the Tax was to have commercial shippers fund the maintenance of U.S. harbors and ports. *See* S. Rep. No. 228, at 5, 1986 U.S.C.C.A.N. at 6709; S. Rep. No. 126, 99th Cong., 1st Sess. 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644.

In enacting the Tax, Congress concurrently established the Harbor Maintenance Trust Fund, 26 U.S.C. § 9505 (1988 & Supp. V 1993) [hereinafter "Trust Fund"], to carry out the purposes of the Act. Monies collected pursuant to the Tax are transferred to the Trust Fund for disbursal upon further appropriation by Congress in accordance with the Trust Fund's provisions. 26 U.S.C. § 9505(b), (c). Since 1991, Congress has authorized appropriations from the Trust Fund to offset up to 100 percent of the eligible operation and maintenance outlays for harbors under

the Act. Water Resources Development Act of 1990 § 316, 33 U.S.C. § 2238 (Supp. V 1993). Congress did not limit expenditure of Tax revenues to the U.S. Army Corps of Engineers, the largest beneficiary of the Trust Fund. Rather, the Departments of the Treasury and Commerce, and the National Oceanic and Atmospheric Administration are also potential recipients of Tax revenues. 26 U.S.C. § 9505(c); *see* Office of Management and Budget, Executive Office of the President, *FY 1996: Budget of the U.S. Government, Appendix*, 376, 802 (1995).

Despite the number of agencies eligible to receive funds, the Trust Fund has been running a yearly surplus since its inception. This surplus burgeoned with the increase in the Tax from 0.04% to 0.125%, (Br. of *Amicus* Amoco Chem. Co., Ex. A (*Second Annual Report to the Congress on the Status of the Harbor Maintenance Trust Fund For Fiscal Year 1993* 5 (1994))) [hereinafter "*Second Annual Rep.*"], and is "on budget." The practice of listing trust fund revenues on budget permits them to be included in calculations of the federal budget deficit. Thus, any monies contributed by such funds to the budget decreases the Treasury's need to borrow in order to finance the federal deficit. *See* H.R. Rep. No. 251 pt. III, 99th Cong., 1st Sess. 19 (1985) ("[t]he increase in net budget receipts [provided by the Tax] will reduce the potential Federal budget deficit by a like amount by providing a new source of user-related revenues rather than relying completely on general fund appropriations"). As of 1994, the government had collected over 500 million dollars from exports alone. (*See* Br. of *Amicus* Polaroid Corp., Ex. A (*First Annual Report to Congress on the Status of the Harbor*

Maintenance Trust Fund Fiscal Years 1987- 1992 4 (1993))) [hereinafter "*First Annual Rep.*"]; *Second Annual Rep.* at 3.

Plaintiff paid the Tax on articles exported for the period April 1 through June 30, 1994. It now sues for recovery of those monies, claiming imposition of the Tax violates the Export Clause.

III

An act of Congress is presumed to be constitutional. *Fairbank*, 181 U.S. at 285, 21 S. Ct. at 649. Any excess in the exercise of legislative power or conflict with the restrictions imposed by the fundamental law should be clear before the court overturns an enactment of the legislature. *Id.* Yet, as Chief Justice Marshall expounded in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803), "the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument." *Id.* at 180.

A.

Defendant contends that the Tax is a valid exercise of Congress's constitutional authority to regulate foreign and interstate commerce, and does not implicate its taxing powers. According to defendant, although the Export Clause restrains those powers, the Clause cannot circumscribe Congress's unlimited capacity to regulate commerce.

The court concludes the power to regulate commerce does not eclipse the Export Clause. Although Congress can adopt the methods it deems necessary to accomplish its goals pursuant to the regulation of commerce, this authority is limited by other provisions of the Constitution. *United States v. Lopez*, — U.S. ——, ——, 115 S.Ct. 1624, 1627, 131 L.Ed.2d 626 (1995) (providing that commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution") (quoting *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196, 6 L.Ed. 23 (1824)); *North Am. Co. v. S.E.C.*, 327 U.S. 686, 704-05, 66 S.Ct. 785, 795-96, 90 L.Ed. 945 (1946) (noting Congress's commerce powers are limited by express provisions in other parts of Constitution); *Rodgers v. United States*, 138 F.2d 992, 994-95 (6th Cir. 1943). Accordingly, even if the court were to find the Tax to be a charge imposed under the commerce power, such a charge is still subject to the restrictions of the Export Clause if it in fact serves as a tax or duty. For example, a charge upon exports imposed under the Commerce Clause as a user fee, or to regulate commerce, would not be immune from the restrictions of the Export Clause if the court found the charge actually to be a tax or duty on exports. The court looks to substance over nomenclature.

The origin of the Export Clause indicates it is to have broad effect. Two amendments seeking to limit it were rejected. The first would have limited the Clause by adding "for the purpose of revenue" to the prohibition against taxes or duties on exports. II *The Records of the Federal Convention of 1787* 363 (Max Farrand ed., 1937). The second amendment would

have permitted export taxes if approved by a two-thirds majority in both Houses of Congress. Note, *Constitutionality of Export Controls*, 76 Yale L.J. 200, 203 (1966). The Constitutional Convention deliberately chose to leave exports unburdened; and, in so doing, persuaded the South to join the new union. *See id.* at 204. For the Southern States, the Export Clause addressed concerns that a Congress controlled by the North would impose burdensome levies on southern exports. *International Business Machs. Corp. v. United States*, 13 Fed. Cir. (T) ——, ——, 59 F.3d 1234, 1236 (1995) [hereinafter "*IBM*"].

The Export Clause serves to keep all exportation free of any tax burden. *Fairbank*, 181 U.S. at 290, 21 S.Ct. at 651. As the Court in Fairbank explained, "[i]f all exports must be free from national tax or duty, such freedom requires not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation." *Id.* at 293, 21 S.Ct. at 652.

B.

The court finds the Harbor Maintenance Tax as it applies to exports constitutes a tax prohibited by the Export Clause and does not fall under Congress's Commerce Clause powers. Defendant contends the Water Resources Development Act does not establish a tax upon exports in violation of the Export Clause, because enhancement of the general revenue is not its primary purpose, but is merely one aspect of a comprehensive legislative program providing for conservation and development of the nation's water resources infrastructure. According to defendant, the value of the benefit provided by the program,

maintenance of safe and efficient ports and harbors, reasonably relates to the charges imposed and accrues, at least in part, to an identifiable private beneficiary. In considering the Act as a whole, defendant contends Congress simply imposed a user fee "for the purpose of making effective the congressional enactment." (Def.'s Mem. in Opp'n to *Amici* at 54) (quoting *Moon v. Freeman*, 379 F.2d 382, 391 (9th Cir. 1967)).

For defendant to succeed on this argument, the court must find that regulation is the primary purpose of the Tax, *see South Carolina ex rel. Tindal v. Block*, 717 F.2d 874, 887 (4th Cir. 1983), *cert. denied* 465 U.S. 1080, 104 S.Ct. 1444, 79 L.Ed.2d 764 (1984), or alternatively, that Congress sought to raise money to recoup the costs of services provided to the payer pursuant to a regulatory scheme, *see Pace v. Burgess*, 92 U.S. 372, 375-76, 23 L.Ed. 657 (1876). The Tax serves neither purpose.

First, the Act neither discourages nor regulates use of a harbor; neither does it so intend. In *Moon*, the court upheld an export certificate program for wheat farmers. 379 F.2d at 391-93. It found the program's monetary imposition for overproduction, essentially a penalty for non-compliance with the Secretary of Agriculture's production controls, did not violate the Export Clause. *Id.* The court held where regulation is the primary purpose of the statute as a whole and revenue also is obtained incidentally through imposition of sanctions, the Constitution will not necessarily prohibit the charge. *Id.* at 391 (quoting *Rodgers*, 138 F.2d at 994). Here, the Act does not have regulation as its primary purpose. For example, it does not seek to control the amount or manner of port use. Further, the Act does not seek

to influence commercial practices, or seek to enforce compliance with a legislative goal as did the Agricultural Adjustment Act of 1938, as amended by the Agriculture Act of 1964, considered in *Moon*, or the Agricultural Act of 1949, as amended, considered in *Block*. Congress instead sought funding for the extensive maintenance projects envisioned under the Act. S. Rep. No. 126 at 7, 1986 U.S.C.C.A.N. at 6644 (noting Congress intended Harbor Maintenance Tax as new tax to cover portion of Federal spending on harbor maintenance).

Second, there is little indication that Congress intended to establish a user fee. Rather, Congress found an alternative way to fund expenditures it intended to make. When Congress enacted the Tax, it intended to use the Tax to pay the costs of developing, operating, and maintaining port projects. H.R. Rep. No. 251, at 19; S. Rep. No. 228, at 5, 1986 U.S.C.C.A.N. at 6709. The Act permitted disbursement of Tax proceeds to the U.S. Army Corps of Engineers for recovery of up to 40 percent of its eligible operation and maintenance outlays. Water Resources Development Act of 1986 § 210(a)(2), 33 U.S.C. § 2238(a)(2) (1988); *see First Annual Rep.* at 1 (noting "[f]ederal expenditures for [port and harbor maintenance] were determined to be synonymous with expenditures made by the Army Corps of Engineers"). The Water Resources Development Act of 1990 increased the rate of the Tax and allowed the Corps of Engineers to recover up to 100 percent of its "eligible operations and maintenance costs." 33 U.S.C. § 2238(a)(2) (Supp. V 1993). Since its inception, the Trust Fund has accumulated significant surpluses. *See* 141 Cong. Rec. E519 (daily ed. Mar. 6, 1995) (statement of Rep.

McDermott). Accordingly, we take note of the warning in *Moon*, "[c]ertainly if the record in any way indicated that substantial amounts of revenue had been generated by the sale of export certificates, we would hesitate before deeming the program an exercise of the commerce power." 379 F.2d at 392.

The court finds the primary purpose of the Tax is to raise revenue, as Congress has imposed "a duty under the pretext of fixing a fee," *Pace*, 92 U.S. at 376. For a charge to withstand constitutional challenge under the Export Clause, it must defray costs of services rendered pursuant to the regulation of commerce, and the taxes collected may not be excessive. In the *Head Money Cases* (*Edye v. Robertson*), 112 U.S. 580, 595-96, 5 S. Ct. 247, 252, 28 L.Ed. 798 (1884), the Supreme Court upheld a *per capita* charge on non-U.S. citizens arriving in the United States by ship. The Court found the statute in question imposed the fee to defray costs appropriated in advance for inspection of immigrants before landing, and for their care and provision afterward. *Id.* at 590, 5 S.Ct. at 249. The Secretary of the Treasury was to "distribut[e] the fund in accordance with the purpose for which it was raised, not exceeding in any port the sum received from it." *Id.* As such, the charges imposed were incidental to the regulation of commerce and directly reimbursed the costs of services rendered to the individual.

Similarly, in *Pace*, the Supreme Court concluded that a fee for stamps used to distinguish tobacco intended for export—and thus to alleviate it from the heavy exactions placed upon tobacco sold domestically—was not a tax on exports. *See* 92 U.S. at 375-76; *see also Turpin v. Burgess*, 117 U.S. 504, 6

S. Ct. 835, 29 L.Ed. 988 (1886) (sustaining, on similar grounds, constitutionality of charge imposed to identify tobacco packages intended for export). Rather, the Court characterized the stamp as a fee "accruing in the due administration of the laws and regulations," serving simply as "compensation given for services properly rendered." *Pace*, 92 U.S. at 375. The Court found the payment for the services rendered, through identification of tobacco exported, was no different than "the fee for clearing the vessel in which [the tobacco] was transported, or for making out and certifying the manifest of the cargo." *Id.* The amount of the fee never exceeded the costs to produce the stamps and the cost of services necessary to give the exporter the benefit of the exemption from taxation; identification of the tobacco provided the exporter the direct benefit of a domestic tax exemption.

In contrast, little nexus binds the imposition of the *ad valorem* tax on cargo to the costs of port maintenance and regulation of shipping. As the exaction is tied to value and there is no mechanism to ensure that the fees collected will be used "only or primarily for the cost of" port maintenance associated with the shipping that is taxed, the Tax is not a user fee imposed under the commerce power. The fees collected, rather, yield funds for the purpose of maintaining and developing American ports and harbors for all uses, commercial and recreational. Further, the Tax funds projects yet to be commenced, or even envisioned, rather than services already rendered. Application of the Tax has produced a substantial surplus in excess of the costs incurred. The court therefore finds the Tax raises revenue, and is not

a user fee imposed pursuant to the regulation of commerce.

The Supreme Court recently has used another test to distinguish between an impermissible tax and a user fee. In *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153, 55 L.Ed.2d 403 (1978), the Court considered whether an aircraft registration fee levied on state police aircraft violated the judicially-implied intergovernmental tax immunity doctrine first set forth in *Collector v. Day*, 78 U.S. (11 Wall.) 113, 20 L.Ed. 122 (1871). In concluding that it did not, the Court relied on three criteria derived from *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707, 92 S.Ct. 1349, 31 L.Ed.2d 620 (1972). To constitute a user fee, as contrasted with a tax, the Court held: (1) the charge must not discriminate against the constitutionally-protected interest; (2) the implementing authority must base the charge upon a fair approximation of the use of some system; and (3) the charge must be structured to produce revenue fairly apportioned to the total cost to the government of the benefits conferred. *Massachusetts*, 435 U.S. at 466-70, 98 S. Ct. at 1166-68.

The Tax fails classification as a user fee under the test presented in *Massachusetts*. Although the Export Clause clearly is designed "to protect constitutionally valued activity from undue burden" that could result from certain taxing measures, *see id.* at 462, 98 S. Ct. at 1164, the court need not decide the issue of whether the tax is discriminatory. Even assuming, *arguendo*, that the Tax is nondiscriminatory, the court finds the Tax fails the remaining two prongs of the *Massachusetts* test.

First, the charge is not based upon some fair approximation of the cost of the benefits port users receive from harbor maintenance and development projects. Low value bulk cargo importers and exporters use port facilities to a much greater extent than high value non-bulk cargo importers and exporters. Yet, the cost to the latter is greater than that to the former. Further, most large ports paying the majority of the costs receive no more than 30% back in maintenance expenditures. (*See, e.g.*, Br. of *Amicus* Amoco Chem. Co., Ex. G (Army Corps of Engineers, *Estimated Receipts of Harbor Maintenance Fee from Cargo Transiting Major Ports* (1992))) (draft document) (noting of $78,711,000 estimated collected 1992 taxes on exports and imports from Port of Los Angeles, only $162,000 returned in port operation and maintenance expenditures). Additionally, although only certain commercial users must pay the tax, they are not the sole users of the ports nor the only beneficiaries of the maintenance and development projects. Based on the foregoing, the court does not find the charge imposed under the Tax is based on a fair approximation of the costs of benefits received by port users.

Second, the charge is excessive in relation to the cost to the government. The Tax is used to fund projects yet to be commenced, or even envisioned, rather than to repay the government for services rendered. The Tax has produced a substantial surplus, that is rapidly expanding, in excess of costs incurred. *Second Annual Rep.* at 5.

In sum, the Tax neither seeks to regulate Commerce nor repay the costs of services rendered; moreover, the Tax fails the alternative test provided

by *Massachusetts*. Accordingly, the Tax is subject to the prohibitions of the Export Clause.

C.

Defendant questions whether the Harbor Maintenance Tax is a tax levied upon "exported articles" within the meaning of the Export Clause. According to defendant, a tax or fee only violates the Export Clause if it is levied on goods by reason of their exportation, *e.g.*, if such goods have entered the export stream. Defendant contends the broad prohibition of the earlier cases against a tax upon goods having entered the export stream was curtailed by *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 96 S. Ct. 535, 46 L.Ed.2d 495 (1976), and further constrained in *Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 98 S.Ct. 1388, 55 L.Ed.2d 682 (1978).

Further, according to defendant, imposition of the Tax upon loading of freight is merely intended to ensure that those who actually use the ports would pay. As such, the time when the Tax attaches has no other significance for purposes of assessment of the fee upon exports. The motivation behind imposing an *ad valorem* charge, defendant insists, was to minimize possible competitive disadvantages among cargo types and U.S. ports that would have arisen from a user charge.

In any case, defendant argues the *Michelin* and *Washington Stevedoring* tests now examine the nature of the tax at issue, rather than the status of the article. Those cases explored whether the taxes were upon "exports as such" and whether they offended the policies protected by the framers of

the Constitution. Those policies, defendant argues, include promoting uniformity among the former colonies and preventing the North from crippling the export-dependent Southern States pursuant to the Import-Export Clause. U.S. Const. art. I, § 10, cl. 2 ("No States shall . . . lay any Imposts or Duties on Imports or Exports . . . ."). Specifically, defendant contends *Michelin* established that a nondiscriminatory *ad valorem* property tax did not violate the Import-Export Clause simply because it applied to recently imported goods—there, tires maintained at a wholesale distribution warehouse. 423 U.S. at 286, 96 S. Ct. at 541. Similarly, defendant contends *Washington Stevedoring* held that a nondiscriminatory local tax that compensates the state for services rendered also failed to implicate the concerns of the Import-Export Clause. 435 U.S. at 755, 98 S. Ct. at 1401.

Integral to these tests, defendant contends, is the court's examination of whether the charge discriminates in imposing its burden. According to defendant, a nondiscriminatory charge for a service that facilitates export activity does not violate the Export Clause. Defendant maintains the Tax is such a charge. The court disagrees.

In examining whether the Tax burdens "exported articles," the court limits its inquiry to the Export Clause, for there is a distinct difference in language between the Import-Export Clause and the Export Clause. *See IBM*, 13 Fed. Cir. (T) at —— - ——, 59 F.3d at 1238-39. The decisions in *Michelin* and *Washington Stevedoring* attached significance to the distinction between "Imposts and Duties," and the Export Clause's broader prohibition. *See Michelin*,

423 U.S. at 290, 96 S. Ct. at 543; *Washington Stevedoring*, 435 U.S. at 759-60, 98 S.Ct. at 1404. As the Supreme Court in *Michelin* noted, the Import-Export Clause only bans "Imposts or Duties" and is not "a broad prohibition of every 'tax.' " 423 U.S. at 290, 96 S. Ct. at 543. According to the Federal Circuit, a difference in policy intended by the framers of the Constitution underlies the difference in language:

> While the Import-Export Clause was intended to prohibit States from imposing a 'transit fee' on goods moving in foreign commerce, the Export Clause served the broader purpose of 'forbid[ding] federal taxation of exports.' The Supreme Court's current narrower view of the prohibition in the Import-Export Clause thus does not dictate that the Export Clause be given a similarly narrow construction.

IBM, 13 Fed. Cir. (T) at ——, 59 F.3d at 1239 (citations omitted). Defendant's citations of *Michelin* and *Washington Stevedoring* are, thus, inapplicable.

Moreover, even if this court were to assume *Michelin* and *Washington Stevedoring* apply to the Export Clause, the cases remain distinguishable. *Michelin* concerned imported tires that had already lost their identity as a unit and as an import after being unloaded and stored within a warehouse. *See* 423 U.S. at 280, 96 S.Ct. at 538. At the warehouse, workers unloaded the containers in which the tires were shipped, sorted the tires by size and style, and stacked them on wooden pallets, without segregation by place of manufacture. *Id.* The tires required no further processing to ready them for sale and delivery to franchised dealers. *Id.* In this sense, the Court found the warehouse operated "no differently than . . .

a distribution warehouse utilized by a wholesaler dealing solely in domestic goods." *Id.* at 302, 96 S. Ct. at 548. Accordingly, the holding in *Michelin* turned on the fact that the goods were no longer in import transit. *Id.* at 286, 96 S.Ct. at 541.

As distinguished from the unloaded and unpacked imports in *Michelin*, the cargo taxed in this case has entered the stream of exports. The cargo, as it is loaded on board the vessel, is in transit, and the Tax falls upon the merchandise itself. As such, it is an article protected by the Export Clause. *Michelin* is inapplicable.

In *Washington Stevedoring*, the Supreme Court upheld a business and occupation tax imposed by the State of Washington upon the value of certain services rendered—the loading and unloading of cargo. *Id.* at 737, 758, 98 S.Ct. at 1392, 1403. The Court distinguished the stevedoring services from maritime insurance policies covering such goods. *Id.* at 756 n. 21, 98 S.Ct. at 1402 n. 21. The Court found placing a tax upon the insurance policies was more suspect, and likely unconstitutional as a violation of the Import-Export Clause, because "the value of goods [bore] a much closer relation to the value of insurance policies on [those goods] than to the value of loading and unloading ships." *Id.* As the amount of the Tax *ad valorem* is tied directly to the value of the goods, *Washington Stevedoring* is equally inapplicable.

Two distinct tests have evolved from case law for determining whether the Export Clause will immunize an article from taxation. First, the court must examine the immediacy of exportation. Second, the court considers the proximity of the tax imposed to

the value of the articles exported. Here, neither test supports the constitutionality of the Tax.

In delineating a zone where an article in the stream of commerce melds into the export stream, the court looks to see whether the article is in the actual process of exportation, and whether it "has begun its voyage or its preparation for the voyage." *Cornell v. Coyne*, 192 U.S. 418, 428, 24 S. Ct. 383, 385, 48 L.Ed. 504 (1904). For instance, where exported articles were delivered to the carrier and title passed, the Supreme Court found those articles had entered the process of exportation. *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 68-70, 43 S. Ct. 485, 485-86, 67 L.Ed. 865 (1923). Thus, taxing such articles would have been unconstitutional. Although other actions may have been necessary before the goods would have been in transit, "so long as [these actions] were only the regular steps" taken to export such goods, the effect of the sale was to start the goods upon their voyage abroad. *See id.* at 69-70, 43 S.Ct. at 486.

Constitutional freedom from the taxation of exports involves more than mere exemption from taxes laid directly upon the articles exported. In *Fairbank*, the Court held that a stamp tax imposed on a foreign bill of lading was equivalent to a tax upon the articles listed, and therefore contrary to the Export Clause. 181 U.S. at 312, 21 S. Ct. at 660. The Court noted exports almost always require bills of lading. *See id.* at 294, 21 S. Ct. at 652 (citing *Almy v. California*, 65 U.S. (24 How.) 169, 174, 16 L.Ed. 644 (1861)) (noting necessities of foreign commerce always require association with bill of lading or similar written instrument). By placing a tax on the bill of lading, the Court reasoned, Congress had violated the letter and

spirit of the Export Clause. *See id.* at 290-291, 300, 312, 21 S.Ct. at 651-652, 655, 660.

Similarly, in *Thames & Mersey Marine Insurance Co. v. United States*, 237 U.S. 19, 35 S.Ct. 496, 59 L.Ed. 821 (1915), the Supreme Court found a tax upon policies of marine insurance on exports prohibited by the Constitution. In reaching its determination, the Court inquired whether the tax imposed was so directly and closely related to the process of exportation that the tax was in substance a tax upon the exports themselves. *Id.* at 25, 35 S.Ct. at 498. The Court found its answer within the dynamics of trade and commerce: where commerce requires an item for exportation—such as a written instrument necessarily and always associated with the export of articles of commerce—taxation of that item serves as taxation of the exported article. *Id.* at 26-27, 35 S. Ct. at 498-99. This prohibition of the Export Clause also has been applied to taxes upon charter parties, contracts for the carriage of full cargo lots, *United States v. Hvoslef*, 237 U.S. 1, 16-17, 35 S.Ct. 459, 464, 59 L.Ed. 813 (1915) and, more recently, to excise taxes on premiums paid to foreign insurers, *IBM*, 13 Fed. Cir. (T) ——, 59 F.3d 1234.

Here, Congress imposed the Tax directly upon exports well along the stream of exportation. The Tax is assessed at the time of loading the cargo. 26 U.S.C. § 4461(c)(2). As a tax imposed upon delivery of cargo to a carrier violates the Export Clause, *see A.G. Spalding*, 262 U.S. at 68-70, 43 S. Ct. at 485-86, a tax imposed on the further step of loading such cargo onto the vessel also falls within the prohibition of the Clause.

The Tax is assessed *ad valorem* directly upon the value of the cargo itself, not upon any services rendered for the cargo, or upon any instruments of commerce that accompany the goods. Further, an *ad valorem* tax is levied in direct proportion to an article's value. Congress could not have imposed the Tax any closer to exportation, or more immediate to the articles exported.

Accordingly, the court concludes the Tax is prohibited by the Export Clause and it need not address *amici's* (claimants in other cases) contentions pertaining to whether the Tax also violates the Due Process Clause or the Port Preference Clause of the Constitution.

IV

As indicated, the parties agree that this court has subject matter jurisdiction, *see supra* p. 410, but disagree as to the specific basis upon which exporters may make claims. Two subsections of the court's jurisdictional statute may provide the parties a route for judicial review. *See* 28 U.S.C. § 1581(a), (i) (1988 & Supp. V 1993). Subsection 1581(a) provides for review of a denial by the Customs Service of a protest of certain duties, charges, exactions, or drawbacks. 28 U.S.C. § 1581(a); 19 U.S.C. § 1515 (1988 & Supp. V 1993). A party must protest a Customs decision within 90 days of the date of the decision to be protested. 19 U.S.C. § 1514(c)(3)(B) (Supp. V 1993). On the other hand, subsection 1581(i) gives the court broad residual authority over civil actions arising out of federal statutes governing import transactions. *Conoco*, 12 Fed. Cir. (T) at ——, 18 F.3d at 1586. Subsection 2636(i) of the same title requires a party

to commence an action under subsection 1581(i) "within two years after the cause of action first accrues." 28 U.S.C. § 2636(i) (Supp. V 1993). The court's decision as to the appropriate jurisdictional basis relates to the amount of plaintiff's recovery.

A.

Defendant argues jurisdiction is only proper under subsection 1581(a). According to defendant, the court may review challenges to the constitutionality of the Tax only where an exporter properly protests its payment, and seeks review of the denial of that protest. Although defendant concedes that "neither jurisdictional provision may fit exactly," (Tr. of Oral Argument at 24 (June 27, 1995)) [hereinafter "Tr."], defendant contends permitting this case to rest upon any other jurisdictional ground would greatly expand the government's liability and would disregard the only congressionally- mandated avenue to challenge the Tax.

According to defendant, Congress intended this Court to entertain a tax challenge only after an exporter had protested its payment of the tax. Defendant garners support for this interpretation from the statutory language directing the court to treat the tax as a customs duty for the purpose of jurisdiction. If the court properly is to treat the tax as a customs duty, defendant contends, the protest procedures under subsection 1581(a) must govern.

Further, defendant argues, there is a Customs decision for the parties to protest—Customs' decision to accept payment. (Tr. at 25.) Defendant contends administration of the Tax is not merely ministerial, because subsection 4462(i), title 26, United States

Code authorizes Customs, through the Department of the Treasury, with administering the assessment of the Tax. Defendant claims Congress has delegated substantial authority to the Secretary of the Treasury (1) to determine the method of payment and collection of the Tax; (2) to exempt certain transactions from the Tax where collection would be impracticable; and (3) to provide for mitigation of penalties and the settlement of claims. Defendant claims this grant of power gives the Secretary of the Treasury "near plenary authority to 'carry out the purposes' of the Act." (Def.'s Mem. in Opp'n to *Amici* at 34.) Accordingly, defendant contends, Customs' power to administer the Tax transcends a ministerial role.

Defendant cites a number of authorities in support of its position. In *Norfolk & Western Railway Co. v. United States*, 18 CIT ___, 843 F. Supp. 728 (1994), defendant asserts the court found the assessment of a user fee similar to the Tax constituted a protestable decision, and the period for filing the protest began when Customs decided the plaintiff would have had to pay the fee. In *General Motors Corp. v. United States*, 10 CIT 569, 643 F. Supp. 1139 (1986), defendant contends the court held administrative procedures, where available, had to be exhausted even before Customs issued its decision. According to the defendant, although the court found the obligation to pay the charges was derived from statute, payment of the duties was pursuant to section 1514, and therefore protestable. The fact that Customs took no affirmative action to collect the duties but only accepted or rejected certain offers, defendant argues, did not alleviate the need for protest.

These arguments are unpersuasive. Section 1581(a) permits review of protest denials by Customs for only certain final decisions enumerated in 19 U.S.C. § 1514(a). *See* 28 U.S.C. § 1581(a); 19 U.S.C. § 1515. For a party to be able to protest and obtain jurisdiction pursuant to section 1581(a), Customs first must have made a decision. *See* 19 U.S.C. § 1514(a), (c) (1988 & Supp. V 1993) (noting Customs decisions are final unless protested and that such protests must "set forth distinctly and specifically" each decision protested).

Acceptance of payment of duties owed does not constitute a protestable decision. *See Dart Export Corp. v. United States*, 43 CCPA 64, 74, C.A.D. 610, 1956 WL 8339 (holding Customs' acceptance of estimated duties tendered did not constitute decision), *cert. denied*, 352 U.S. 824, 77 S.Ct. 33, 1 L.Ed.2d 48 (1956); *Best Foods, Inc. v. United States*, 37 Cust. Ct. 1, 9-10, 147 F. Supp. 749, 756-57 (1956) (holding payment of customs duties at time of entry not decision for purpose of computing time to file protest). Customs plays little role in accepting the payments; rather, they arrive at a "postal rental box serviced by a commercial bank that processes [Harbor Maintenance Fund] payments and deposits them to the United States Treasury." United States General Accounting Office, *U.S. Customs Service: Limitations in Collecting Harbor Maintenance Fees*, GAO/GGD-92-25, at 5 (Dec. 1991). As recognized by this court in *Carnival*, it would be impossible to protest the Tax as "there was no decision of Customs which [plaintiffs] could protest." 18 CIT at ____, 866 F. Supp. at 1441.

Neither the Harbor Maintenance Tax statute, nor its regulations, require a decision from Customs. As previously noted, the statute imposes a Tax on commercial cargo at loading for exports and unloading for imports. 26 U.S.C. § 4461(c)(2). Liability is an *ad valorem* percentage of the cargo value. 26 U.S.C. § 4461(b) (Supp. V 1993). Value is determined by standard commercial documentation. 26 U.S.C. § 4462(a)(5)(A). Thus Congress, and not Customs, has set the time of imposition and the amount of the Tax. The regulations require exporters to pay port "use fees" on a quarterly basis and mail their payment with a quarterly summary report or cover letter identifying the exporter to Customs' post office box in Chicago. 19 C.F.R. § 24.24(e) (1995). Exporters may request refunds by mailing an amended quarterly summary report with a copy of the quarterly summary report for the quarter(s) in which they request a refund to the Chicago post office box, *id.*, or alternatively by filing with Customs Headquarters through general provisions for claims not otherwise provided for by the regulations, 19 C.F.R. § 24.73 (1995). None of these procedures requires Customs to judge the constitutionality of the Tax, and cannot be considered decisions with respect to payment. These actions are merely ministerial in nature. Although there may be circumstances where Customs might exercise discretion in administering and enforcing the Tax, this discretion does not extend to a determination on the constitutionality of the Tax.

In this case, there are no issues of classification or similar issues which would be part of a protestable decision. In *Mitsubishi Electronics America, Inc. v. United States*, 12 Fed. Cir. (T) ——, ——, 44 F.3d 973,

976 (1994), the Federal Circuit held Customs does not make protestable decisions concerning antidumping duties under 19 U.S.C. § 1514(a). The Court of Appeals emphasized that Customs only performed a ministerial function in collecting such duties under the direction of the Department of Commerce, and Customs did not conduct an investigation, determine rates and margins, or issue antidumping orders. 12 Fed. Cir. (T) at ——, 44 F.3d at 977. Plaintiff and amici do not argue that they have overpaid the amount of the Tax; rather, their challenge goes to the heart of the constitutionality of the statute itself, a matter outside of Customs' authority. *See generally McCarthy v. Madigan*, 503 U.S. 140, 147-48, 112 S. Ct. 1081, 1087-88, 117 L.Ed.2d 291 (1992) (noting agency may be unable to consider whether relief should be granted, because of lack of institutional competence to resolve issues presented). Similarly, in *United States Cane Sugar Refiners' Ass'n v. Block*, 3 CIT 196, 201, 544 F. Supp. 883, 887, *aff'd*, 69 CCPA 172, 683 F.2d 399 (1982), in which protest was not required, Customs could not change the scope of the Presidential Proclamation as to over-quota sugar. Much like *Mitsubishi* and *Cane Sugar Refiners'*, there is no decision by Customs as to whether it will assess the Tax.

Customs does not determine the application, policies, or rates of the Tax, but merely serves to implement its provisions. As distinguished from *National Corn Growers Ass'n v. Baker*, 6 Fed. Cir. (T) 70, 840 F.2d 1547 (1988), where the policies and rates in question were those of Customs, and "peculiarly within the ambit of the Customs Service to correct," 6 Fed. Cir. (T) at 82, 840 F.2d at 1556,

Customs is powerless to correct the constitutional infirmities raised by plaintiff. *See Califano v. Sanders*, 430 U.S. 99, 109, 97 S.Ct. 980, 986, 51 L.Ed.2d 192 (1977) (finding administrative hearing procedures unsuited to resolving constitutional issues). In short, Customs must simply follow the path enacted by Congress.

Moreover, neither of defendant's proffered cases, *Norfolk* nor *General Motors*, supports its position. The protestable decision in *Norfolk*—an assessment of a user fee—is distinguishable from the present case. In *Norfolk*, the protestable decision was Customs' particular application of a statute. 18 CIT at ——, 843 F. Supp. at 733. Customs' decision was limited to whether a vessel constituted a ferry or a barge, not whether the application of the user fee was constitutional.

General Motors is equally inapposite. The issue concerned whether car radio components imported into the United States as original motor-vehicle equipment were diverted for other uses, and therefore subject to penalty. 10 CIT at 570, 643 F. Supp. at 1139-40. Defendant argues the court found "*payment* [of duties] equated to the protestable event," even though the duty to pay was derived from statute, and not a Customs decision. (Def.'s Br. in Opp'n to *Amici* at 32.) This argument is misplaced. Plaintiff only paid the diversion duties "[o]nce Customs indicated to plaintiff that it considered the merchandise diverted." 10 CIT at 575, 643 F.Supp. at 1143 (emphasis added). Customs made a decision in finding General Motors had diverted the radios. Again, Customs did not consider the constitutionality of the statutory scheme as a whole.

Defendant's own arguments support Customs' inability to make a decision as to the constitutionality of the Tax. Defendant initially argues, "[t]he decision requiring the payment is the law itself, the compulsion to pay is provided by the statute itself. The decision is the decision to accept payment from the exporter." (Tr. at 26.) Defendant subsequently qualifies this statement, noting, "[i]t isn't a decision by Customs to accept and retain the money, it has no authority to return it unless the proper procedures have been followed, which are filing of a protest and a denial of a protest." *Id.* at 59. Such reasoning is circular. For plaintiffs to file a valid protest, Customs must have made a protestable decision. As a decision, according to the defendant, can only be made after the protest is filed, no protestable decision exists.

Finally, certain *amici* contend the denial of a refund request pursuant to 19 C.F.R. § 24.24(e)(5) is a protestable decision, and that subsection 1581(a) would provide the appropriate basis for jurisdiction. Although Customs has discretion to decide whether it is able to refund payments of the Tax, such discretion is limited and does not extend to determinations of constitutionality. As Customs does not have the power to decide the constitutionality of the Tax, the court finds protestable decisions pursuant to the refund provision of subsection 24.24(e)(5) are limited to decisions pertaining to the administration of the Tax, not its constitutionality.

B.

Subsection 1581(i) embraces the issues contested as to the Harbor Maintenance Tax. It provides, in pertinent part,

> (i) In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a)-(h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for—
>
> (1) revenue from imports or tonnage;
>
> * * * * *;
>
> * * * * *;
>
> (4) administration and enforcement with respect to the matters referred to in paragraph (1)-(3) of this subsection and subsections (a)-(h) of this section.

28 U.S.C. § 1581(i). Congress directed the Tax be treated as a customs duty for purposes of jurisdiction. Such duties, by their very nature, provide for revenue from imports, and are encompassed within subsection 1581(i)(1).

Congress similarly intended the administration and enforcement of the Tax to be treated as the administration and enforcement of a customs duty. 26 U.S.C. § 4462(f)(1). Thus, jurisdiction lies under subsection 1581(i)(4) as it relates to subsection 1581(i)(1).

In sum, jurisdiction is provided by 28 U.S.C. § 1581(i).

V

The court finds the Harbor Maintenance Tax, as it applies to exports unconstitutional. Plaintiff's motion for summary judgment is granted; defendant's cross-motion for summary judgment is denied. Parties are to submit a proposed judgment in conformity with the opinion within 20 days.

MUSGRAVE, Judge, concurring.

I concur in the opinion that the Harbor Maintenance Revenue Act (the "Act") is unconstitutional as it applies to exports and that the plaintiff U.S. Shoe is entitled to the remedy it requests, namely a refund of export taxes going back two years from the time it filed its complaint. Nevertheless, I offer some additional comments addressing the jurisdictional issue and the prayers of certain amici for a full refund of all taxes illegally collected from them since the implementation of the Act.[1] In my view, the manifestly inadequate administrative protest procedure under 28 U.S.C. § 1581(a) is a further reason that 28 U.S.C. § 1581(i) jurisdiction arises; moreover, com-

[1] *E.g.*, "*Amici* respectfully join in plaintiff's request that this Court find the HMT unconstitutional, strike it down, and direct pursuant to the power granted it under 28 U.S.C. § 1585 that *all HMT payments unlawfully collected be refunded*, together with such other and further relief as may be appropriate." (*Amici* Texaco *et al.*'s Mem. Supp. Summ. J. at 2) (emphasis added).

plainants are entitled to a restitution of all taxes heretofore exacted under the Act in violation of the Export Clause of the United States Constitution.[2] This latter position is compelled by the Fifth Amendment Due Process Clause enjoining the deprivation of "life, liberty, or property, without due process of law."

I

As an initial matter, recent opinions of the Court of Appeals for the Federal Circuit and this Court have ruled unambiguously that a *decision* by the Customs Service ("Customs") is a condition precedent for section 1581(a) jurisdiction to arise. *Mitsubishi Electronics of America, Inc. v. U.S.*, 44 F.3d 973 (Fed. Cir. 1994); *Carnival Cruise Lines v. U.S.*, 18 CIT — —, 866 F. Supp. 1437 (1994). As the Court's opinion makes abundantly clear, there is no *decision* involved in Customs' collection of these unconstitutional taxes because Customs lacks discretion in the performance of its delegated ministerial duties. In addition to this reason, however, there is a further justification for the Court to invoke its section 1581(i) jurisdiction in this case: requiring plaintiffs to pursue a remedy under the protest procedures mandated by section 1581(a) would oblige them to follow a manifestly inadequate and utterly futile procedure.

Certain *amici* argue that a party could presumably request a refund as set forth in 19 C.F.R. §§ 24.24(e)(5) or 24.73, obtain a denial of refund from Customs, and then protest that decision of Customs to deny the refund by way of the administrative

[2] The other jurists on this panel are not in accord with the comments addressing the remedy issue.

protest process prescribed by 19 U.S.C. §§ 1514 and 1515. According to these *amici*, the Court could dismiss as not ripe for adjudication those actions which were filed prior to Customs denying a refund request, but instead should waive exhaustion of administrative remedial procedures and assert jurisdiction under section 1581(i), as such procedures are inadequate for the type of relief sought. (Br. of *Amici Curiae* Aris-Isotoner, *et al.*, at 14-22.) Plaintiff and nearly all amici argue that the available administrative protest remedy set forth in 19 U.S.C. §§ 1514 and 1515 is futile and manifestly inadequate under the circumstances. The ultimate issue presented by such arguments is whether administrative remedies set forth by statute and regulations are appropriate when a party seeks a refund of payments mandated by an act of Congress by challenging such act as unconstitutional.

The administrative remedial procedure as it applies to refund requests is clearly not meaningful or adequate under the given circumstances. *See generally McCarthy v. Madigan*, 503 U.S. 140, 144-149, 112 S. Ct. 1081, 1085- 89, 117 L.Ed.2d 291 (1992) (explaining circumstances in which administrative remedies need not be exhausted); and *Conoco v. Foreign Trade Zones Board*, 18 F.3d 1581 (Fed. Cir. 1994) (holding section 1581(a) jurisdiction inappropriate where it is futile or manifestly inadequate). Most importantly, as the Court's opinion makes clear, Customs does not have authority to refund Tax payments or otherwise grant effective relief for constitutional claims. It is well settled that an administrative agency lacks the authority to declare an act of Congress unconstitutional. *See Califano v. Sanders*, 430 U.S. 99, 109, 97

S. Ct. 980, 986, 51 L.Ed.2d 192 (1977) ("Constitutional questions obviously are unsuited to resolution in administrative hearing procedures and, therefore, access to the courts is essential to the decision of such questions."). Hence, under the circumstances of this case Customs is compelled to deny any administrative refund claim, making a request for refund a futile act.

Moreover, Customs has predetermined the issue before it. As plaintiff points out, Customs' denial of protests challenging the constitutionality of the Harbor Maintenance Tax (26 U.S.C. §§ 4461 and 4462, hereinafter the "Tax") is a foregone conclusion. (Pl.'s Mem. Supp. Summ. J. at 15-16.) Customs routinely denies all of the protests it receives in connection with Tax payments. The denial is a form letter simply asserting in one sentence that the levy is not an unconstitutional tax but a statutorily mandated user fee.[3] Such routine denial demonstrates that filing refund requests with Customs on grounds of unconstitutionality is clearly a futile act.

Lastly, requiring a party to file for refunds may unduly prejudice that party. "[P]rejudice may result, for example, from an unreasonable or indefinite timeframe for administrative action." *McCarthy*, 503 U.S. at 147, 112 S.Ct. at 1087. The administrative refund processes set forth under 19 C.F.R. §§ 24.24(e)(5) and 24.73 do not provide a time frame for the resolution of a claim for refund. This Court has recently deemed it appropriate to waive exhaustion

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[3] Declaration of Charles Davies, Director—User Fee Task Force, Headquarters Office of Inspection and Control at 6, and attachments.

of administrative remedies because they were not clearly delineated and because they set up indefinite timetables. *B-West Imports v. United States*, 19 CIT ——, 880 F. Supp. 853 (1995). The administrative refund procedures are similarly indefinite and are therefore inadequate under the circumstances of the present case.

Before this Court may exercise jurisdiction over this matter by way of section 1581(i), there must be terms within the language of that section which cover the issues plaintiff brings before the Court. *Conoco*, 18 F.3d at 1588-89. Defendant argues that section 1581(i) by its own terms fails to provide a jurisdictional basis for a constitutional challenge to the Tax because plaintiff's claims are based upon payments associated with exports, while the express terms of subsections 1581(i)(1) and (2) apply only to imports. (Defs. Mem. Supp. Summ. J. at 24.)

The terms of section 1581(i) make clear that the Court has jurisdiction over any civil action that arises out of any United States law providing for the matters set forth in the statute. Defendant's reading of section 1581(i) would eliminate that all-encompassing term and in effect grant the Court jurisdiction only over the specific matters set forth in subsections 1581(i)(1)-(4), but not the laws dealing with those matters. Such an interpretation would mean that this Court would have jurisdiction over the Tax as it applies to imports, the district courts would have jurisdiction over the Tax as it applies to exports, and it is uncertain as to which court would have jurisdiction over the Tax as it applies to, *e.g.*, passenger services.

As the opinion of the Court points out, Congress did not intend for the district courts to exercise jurisdiction over the Tax. The statutory language of 26 U.S.C. § 4462(f)(2) and its accompanying legislative history indicate Congress' clearly stated intention that this Court have jurisdiction over the Tax. Furthermore, "[S]ection 1581(i) was intended to give the Court of International Trade broad residual authority over civil actions arising out of federal *statutes* governing import transactions and to eliminate the confusion over whether jurisdiction lay in the Court of International Trade or the district courts." *Conoco*, 18 F.3d at 1588 (emphasis added). Thus it was the intent of Congress for this Court to exercise jurisdiction over the entire Tax, not just those portions of the Tax that are covered under the specific subsections 1581(i)(1)-(4).

The terms of section 1581(i) embrace the Tax. This Court has found that the Tax is a law which provides for revenues from imports and exports, and for the administration and enforcement with respect to those revenues including the protest process. Therefore, subsections 1581(i)(1) and (4) provide this Court with jurisdiction over the Tax.

In sum, Customs has not made a decision with respect to the Tax upon which a valid or meaningful protest may be predicated. Defendant's arguments simply ignore that necessary prerequisite to the protest process set forth under 19 U.S.C. §§ 1514 and 1515. Moreover, under the circumstances of this case, it is futile and manifestly inadequate to await a decision by Customs with respect to an administrative refund request. As required, the terms of section 1581(i) cover the issues that plaintiff brings before

the Court. The Court's jurisdiction is therefore properly asserted over this matter by way of section 1581(i). The Court is authorized by statute to exercise discretion in requiring exhaustion of administrative remedies. 28 U.S.C. § 2637(d). Having found jurisdiction under section 1581(i), pursuant to this Court's discretionary powers under 28 U.S.C. § 2637(d), and for the reasons previously discussed, it is inappropriate to require exhaustion of any administrative remedy when, as in this case, a party requests a refund by challenging the constitutionality of an act under which payment was made.

II

It is the duty of this Court to exercise judicial review over Congressional acts within its jurisdiction, and "[s]hould Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution . . . it would become the painful duty of this tribunal . . . to say, that such an act was not the law of the land." *M'Culloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 423, 4 L.Ed. 579 (1819). As the opinion of the Court details, there is no question that the Act violates the Export Clause. Insofar as the Act therefore is not the law of the land, it is void *ab initio*: "an invalid exercise of the power of Congress . . . [is] as inoperative as if it had never been passed, for an unconstitutional act is not a law, and can neither confer a right or immunity. . . ." *Chicago, I. & L.R. Co. v. Hackett*, 228 U.S. 559, 566, 33 S.Ct. 581, 584, 57 L.Ed. 966 (1913). When the invalid act is the federal government's unconstitutional exaction of taxes, taxpayers' rights under the Due Process Clause of the Fifth Amendment are implicated. "Thus, if a

plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy." *Reynoldsville Casket Co. v. Hyde*, ___ U.S. ____, ____, 115 S.Ct. 1745, 1752, 131 L.Ed.2d 820 (1995) (Scalia, J., concurring).

A tax refund is the only appropriate remedy for the government's illegal collection of revenue under the Act. Because the tax violates the Export Clause, it was "beyond the [government's] power to impose, . . . [and the government has] no choice but to undo the unlawful deprivation by refunding the tax previously paid under duress, because allowing the [government] to collect these taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the [Due Process Clause]." *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco, Fla. Dept. of Business Regulation*, 496 U.S. 18, 39, 110 S. Ct. 2238, 2251, 110 L.Ed.2d 17 (1990). Yet an attempt to collect all moneys illegally exacted since the tax's incipience in 1987 ostensibly conflicts with the two-year statute of limitations applicable generally to claims brought under 28 U.S.C. § 1581(i). Due to the peculiar circumstances of this case, however, enforcing the statute of limitations would impermissibly infringe constitutional rights guaranteed under the Fifth Amendment Due Process Clause.

The United States Supreme Court has held that "[a] constitutional claim can become time-barred just as any other claim can. . . . Nothing in the Constitution requires otherwise." *Block v. North Dakota*, 461 U.S. 273, 292, 103 S.Ct. 1811, 1822, 75 L.Ed.2d 840

(1983). While valid claims based upon unconstitutional acts by the federal government may at some time become stale or deemed waived, an attempt, as here, at interposing a very short statute of limitations runs afoul of due process and flaunts the sovereign's role as, among other things, protector of rights of its citizens, from whom *this* government, almost uniquely when it was created, acquired all of its powers. And here, the legislative history reflects that the drafters of the Act were abundantly aware of the constitutional infirmity of the Act; this being true, enforcing the foreshortened statute of limitations is to reward the perpetration of an overtly unconstitutional action.

The Bill of Rights incorporates those indefeasible rights which the citizens decline to surrender to the sovereign, and it is this very feature of our constitutional democracy—that the government is empowered only to the extent that citizens surrender their rights—which distinguishes it from other political systems in which people derive their rights only from the state. Although the federal government enjoys broad immunity, this immunity does not extend to unconstitutional behavior, and a statute of limitations that operates in violation of the Due Process Clause constitutes an invalid exercise of the power of Congress which does not immunize the government from suit.[4]

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[4] *See* Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale L.J. 1425, 1427 (1987) ("[W]henever a government entity transgresses the limits of its delegation [of powers] by acting *ultra vires*, it ceases to act in the name of the sovereign, and surrenders any derivative "sovereign" immunity it might otherwise possess.").

[T]he exercise by Congress of its control over jurisdiction is subject to compliance with at least the requirements of the Fifth Amendment. That is to say, while Congress has the undoubted power to give, withhold, and restrict the jurisdiction of courts other than the Supreme Court, it must not so exercise that power as to deprive any person of life, liberty, or property without due process of law or to take private property without just compensation.[5]

Battaglia v. General Motors Corp., 169 F.2d 254, 257 (2d Cir. 1948). "[T]o hold otherwise would be to create the possibility that Congress could act unconstitutionally and then attempt to shield its action from review by virtue of sovereign immunity." *Bartlett v. Bowen*, 816 F.2d 695, 708 (D.C. Cir. 1987). Thus, it is to no avail that the interlocutor points to the jurisdictional nature of the statute of limitations presently under consideration. Moreover, "The courts . . . have recognized a principle that the constitutional guarantee of an independent judiciary limits the legislature in the exercise of its power to regulate court jurisdiction." *Bartlett*, 816 F.2d at 705. The judicial branch must not countenance the disenfranchisement of democratic constitutional rights in deference to the royal cloak of sovereign immunity. To do so would be to abrogate the judi-

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[5] *See also International Tel. & Tel. Corp. v. Alexander*, 396 F. Supp. 1150, 1163 n. 31 (D. Del. 1975) (discussing federal tax protest and remedy statutes and declaring, "As previously noted, both statutes are jurisdictional and are within the power of Congress to enact pursuant either to Art. III, § 1 of the Constitution or the sovereign immunity of the federal government. . . . These respective sources of power, however, cannot be utilized by Congress to shield from judicial review governmental action violative of constitutional guarantees.").

ciary's proper role as protector and final arbiter of constitutional rights, a role implicit in the separation of powers established by our constitutional scheme and made decisively explicit in *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

The Supreme Court has recognized that procedural requirements in tax refund cases must satisfy all the provisions of the Constitution. Discussing procedural obstacles which might bar a refund of state taxes collected in violation of the Constitution, the Court declared, "*Depending upon whether or not this independent rule satisfied other provisions of the Constitution*, it could independently bar the taxpayers' refund claim." *Hyde*, ____ U.S. at ____, 115 S. Ct. at 1750 (emphasis added). In this vein the Court has indicated that states may enforce "relatively short statutes of limitation applicable to such actions." *McKesson*, 496 U.S. at 45, 110 S. Ct. at 2254 (citing Florida's three-year statute of limitations for tax refund suits). Although states may promulgate statutes of limitations in connection with tax refund statutes, they are bound to provide substantive relief for revenue exacted in violation of the Constitution. A state's post-deprivation tax refund regime must afford "an opportunity to contest the validity of the tax and a 'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40, 110 S. Ct. at 2252 (quoting *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285, 32 S. Ct. 216, 217, 56 L.Ed. 436 (1912)). Moreover, when a state places

> a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide *meaningful backward-looking relief to rectify any unconstitutional deprivation.*

Id. at 31, 110 S. Ct. at 2247 (emphasis added).

In tax refund cases the Fifth Amendment Due Process Clause does not endow the federal government with the flexibility the states enjoy when fashioning schemes to redress unconstitutional exactions. The relevant state obligations under the Fourteenth Amendment Due Process Clause owe their flexible nature to principles of federalism and comity:

> We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration. . . . [T]his Court [has repeatedly] shown an aversion to federal interference with state tax administration. . . . The reluctance to interfere in state tax collection continued in *McKesson*, in which we confirmed that the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation.

National Private Truck Council v. Oklahoma Tax Comm'n, ___ U.S. ____, ____, 115 S. Ct. 2351, 2354, 132 L.Ed.2d 509 (1995) (citation omitted). In the instant case, there exists no question of "comity" between the federal government and a state, and under *Mc-*

Kesson and its progeny, a two-year statute of limitations in tax refund cases may well be unconstitutional at the state level. Although there is no precedent directly on point, it is evident that in this case, the more stringent due process obligations incumbent on the federal government entail that enforcing the two-year statute of limitations would infringe Fifth Amendment rights by, *inter alia*, failing "to provide meaningful backward-looking relief to rectify any unconstitutional deprivation."

There is no need to speculate on a constitutionally permissible term for a statute of limitations in this type of case. Having found the statute of limitations inapplicable, it is my opinion that the imperatives of due process require a full refund back to the date of the Act's implementation, *i.e.*, 1987 (the bulk of unconstitutional exactions appear to have occurred subsequent to the increase of the tax from .04% to .125%, in 1991). Although the government has a legitimate interest in orderly and predictable tax administration, Justice O'Connor explained that "*McKesson* makes plain that equitable considerations are of limited significance once a constitutional violation is found." *American Trucking Ass'ns v. Smith*, 496 U.S. 167, 184, 110 S.Ct. 2323, 2334, 110 L.Ed.2d 148 (1990). Any misplaced concern for visiting hardship upon the government by requiring a complete refund of the unconstitutionally exacted taxes is dispelled by the fact that at the end of fiscal year 1994, the fund generated by the Act contained a $453 million *surplus*,[6] while the total sums collected

[6] Dept. of the Treasury, Financial Management Service, Funds Account Branch, Harbor Maintenance Trust Fund Income Statement and Balance Sheet, 10/1/93-9/30/94.

since the Act's inception amounted to $2.7 billion, $700 million of which was derived from unconstitutional export taxes. (Def's. Mem. Supp. Summ. J. at 5). Furthermore, the fund's cumulative surplus is expected to balloon to nearly $1.7 billion by the end of fiscal year 1999.[7] Under the circumstances, restitution of all unconstitutional exactions collected since the Act's implementation is appropriate where such relief is requested.

[7] Army Corps of Engineers Internal Briefing Outline (Feb. 2, 1995).

Supreme Court, U.S.
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In The

Supreme Court of the United States

OCTOBER TERM, 1996

UNITED STATES OF AMERICA,
Petitioner,

v.

UNITED STATES SHOE CORPORATION,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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October 1997

QUESTION PRESENTED

Whether the lower courts correctly ruled that the Export Clause of the United States Constitution precludes the application of a federal *ad valorem* tax on articles to be exported from the United States, particularly where the tax in question — the Harbor Maintenance Tax, 26 U.S.C. § 4461 — imposes a tax burden that exceeds by hundreds of millions of dollars the harbor maintenance services supposedly funded by the tax.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 LISTING

On May 23, 1995, the assets of the Footwear Division of Respondent United States Shoe Corporation were acquired by Nine West Group Inc. Nine West Group Inc. is a publicly traded company. There are no parent companies and no nonwholly owned subsidiaries other than as set forth herein.

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In The

Supreme Court of the United States

OCTOBER TERM, 1996

No. 97-372

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES SHOE CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions set forth in the Government's petition, the following statutory provisions are also relevant:

26 U.S.C. § 9505 provides:

Harbor Maintenance Trust Fund

(a) Creation of trust fund.— There is hereby established in the Treasury of the United States a trust fund to be known as the "Harbor Maintenance Trust Fund", consisting of such amounts as may be—

(1) appropriated to the Harbor Maintenance Trust Fund as provided in this section,

(2) transferred to the Harbor Maintenance Trust Fund by the Saint Lawrence Seaway Development Corporation pursuant to section 13(a) of the Act of May 13, 1954, or

(3) credited to the Harbor Maintenance Trust Fund as provided in section 9602(b).

(b) Transfer to Harbor Maintenance Trust Fund of amounts equivalent to certain taxes.— There are hereby appropriated to the Harbor Maintenance Trust Fund amounts equivalent to the taxes received in the Treasury under section 4461 (relating to harbor maintenance tax).

(c) Expenditures from Harbor Maintenance Trust Fund.— Amounts in the Harbor Maintenance Trust Fund shall be available, as provided by appropriation Acts, for making expenditures —

(1) to carry out section 210 of the Water Resources Development Act of 1986 (as in effect on the date of the enactment of the Water Resources Development Act of 1996),

(2) for payments of rebates of tolls or charges pursuant to section 13(b) of the Act of May 13, 1954 (as in effect on April 1, 1987), and

(3) for the payment of all expenses of administration incurred by the Department of the Treasury, the Army Corps of Engineers, and the Department of Commerce related to the administration of subchapter A of chapter 36 (relating to harbor maintenance tax), but not in excess of $5,000,000 for any fiscal year.

26 U.S.C. § 9602 provides:

Management of Trust Funds

* * *

(b) Investment.—

(1) In general.—It shall be the duty of the Secretary of the Treasury to invest such portion of any Trust Fund established by subchapter A as is not, in his judgment, required to meet current withdrawals. Such investments may be made only in interest-bearing obligations of the United States...

STATEMENT

This suit challenges the Harbor Maintenance Tax ("HMT"), as applied under § 4461 of the Internal Revenue Code (26 U.S.C. § 4461) to merchandise exported from the United States, as violative of the Export Clause of the United States Constitution. The Export Clause provides that "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5. The United States Court of International Trade ("CIT") held the HMT unconstitutional as applied to exports, and the Court of Appeals for the Federal Circuit affirmed, relying in substantial part on this Court's

recent decision in *United States v. International Business Machines Corp.*, 116 S. Ct. 1793 (1996) (hereinafter "*IBM*").

The HMT is described in the statute as a "tax on any port use." 26 U.S.C. § 4461(a). The term "port use" is defined as the loading or unloading of commercial cargo on or from a commercial vessel at a port. 26 U.S.C. § 4462(a)(1). As applied to exports, the HMT is (1) paid by the exporter (26 U.S.C. § 4461(c)(1)(B)); (2) assessed as a percentage (currently 0.125%) of the value of the exported merchandise (26 U.S.C. § 4461(b)); and (3) imposed at the time the goods are loaded on the vessel for export (26 U.S.C. § 4461(c)(2)).

HMT payments are received by the United States Customs Service and deposited into the United States Treasury (App. 70a, *citing* U.S. General Accounting Office, *U.S. Customs Service: Limitations in Collecting Harbor Maintenance Fees*, GAO/GGD-92-25, at 5 (Dec. 1991)). An equivalent amount of monies received is then appropriated from the Treasury to the Harbor Maintenance Trust Fund ("Trust Fund"), from which expenditures may be made if further authorized by Congress. 26 U.S.C. § 9505.

The Trust Fund has run a yearly surplus since its inception. (App. 51a, *citing Second Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1993* at 5 (1994)).[1] The cumulative surplus was $865 million as of fiscal year 1996 and is projected to reach nearly $3 billion as of fiscal year 2001. *Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Years 1995 and 1996* at 7 (1997) ("*1995-96 Annual Report*"). *See also* App. 88a-89a (referring to surplus as of 1994).

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[1] The President is required to transmit annually to Congress a report on the status of the Trust Fund. Pub. L. 102-580, § 330, 106 Stat. 4797, 4851 (1992).

HMT revenues are included in federal budget calculations. As the CIT observed:

> The practice of listing trust fund revenues on budget permits them to be included in calculations of the federal budget deficit. Thus, any monies contributed by such funds to the budget decreases the Treasury's need to borrow in order to finance the federal deficit.

(App. 51a, *citing* H.R. Rep. No. 251 pt. III, 99th Cong., 1st Sess. 19 (1985)).

Respondent United States Shoe Corporation filed suit in the CIT for a refund of HMT paid in connection with its exports for the quarter ending June 30, 1994. A three-judge panel unanimously held that the HMT, as applied to exports, is unconstitutional under the Export Clause. A five-judge panel of the Court of Appeals for the Federal Circuit affirmed the CIT's judgment, with one judge dissenting.[2]

In holding that the HMT is an unconstitutional tax on exported articles, the CIT stated (App. 66a-67a):

> Here, Congress imposed the Tax directly upon exports well along the stream of exportation. The Tax is assessed at the time of loading the cargo. 26 U.S.C. § 4461(c)(2). As a tax imposed upon delivery of cargo to a carrier violates the Export Clause, *see A.G. Spalding*, 262 U.S. at 68-70, 43 S. Ct. at 485-86, a tax imposed on

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[2] Both courts below unanimously held that the CIT had jurisdiction under 28 U.S.C. § 1581(i). The Government acknowledges that the CIT properly exercised jurisdiction (Pet. 7 n.2), but its explanation of the CIT's jurisdiction is inaccurate. The Court of Appeals confirmed that the CIT had subject matter jurisdiction under 28 U.S.C. § 1581(i), as there is no basis upon which to file a valid protest challenging the HMT because the prerequisite to such a filing — a "decision" of the Customs Service — is nonexistent in the HMT context, and therefore jurisdiction under 28 U.S.C. § 1581(a) cannot lie. (App. 8a-13a).

the further step of loading such cargo onto the vessel also falls within the prohibition of the Clause.

The Tax is assessed *ad valorem* directly upon the value of the cargo itself, not upon any services rendered for the cargo, or upon any instruments of commerce that accompany the goods. Further, an *ad valorem* tax is levied in direct proportion to an article's value. Congress could not have imposed the Tax any closer to exportation, or more immediate to the articles exported.

The CIT found that the HMT is not a user fee under the three-prong test set forth by the Court in *Massachusetts v. United States*, 435 U.S. 444 (1978), as derived from *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). Under *Massachusetts*, in order to constitute a user fee rather than a tax, (1) the charge must not discriminate against the constitutionally-protected interest; (2) the implementing authority must base the charge upon a fair approximation of the use of the system at issue; and (3) the charge must be structured to produce revenue fairly apportioned to the total cost to the Government of the benefits conferred. *Massachusetts*, 435 U.S. at 464-70. While failure to meet just one prong would have disqualified the HMT from being considered a user fee, the CIT found that the HMT fails both the second and third prongs. (App. 60a).

The CIT concluded that the HMT is not based upon a fair approximation of use for the following reasons: (1) exporters and importers of low-value bulk cargo use port facilities to a much greater extent than exporters and importers of high-value non-bulk cargo, yet the former bear lower HMT costs than the latter; (2) most large ports paying the majority of HMT costs receive no more than 30% back in maintenance expenditures; and (3) although only certain commercial users must pay the tax, they are not the sole users of the ports nor

the only beneficiaries of maintenance and development projects.[3] (App. 60a).

With respect to the third prong under *Massachusetts*, the CIT recognized not only that the HMT is "on budget," thereby permitting HMT revenues to be included in calculations of the federal deficit (App. 51a), but also found that the HMT is excessive in relation to the cost to the Government, as it is used to fund projects yet to be commenced or even envisioned (rather than to repay the Government for services rendered), and has produced a continually expanding surplus that is used to offset general federal deficits. (App. 60a).

Relying in substantial part on this Court's recent decision in *IBM*, the Court of Appeals affirmed the CIT's holding that the HMT is unconstitutional as a tax or duty on exported articles. The court noted (App. 24a):

> Here, the HMT is imposed on an *ad valorem* basis at the time the exported goods are loaded on the vessel, rather than at some prior point in time when the goods are not yet bound for export. The exporter, rather than the manufacturer, pays the tax. In the absence of the export act of loading the goods, and in the absence of the exporter's documents required for that act, the HMT would not be owed and no amount could be determined because the HMT is incurred at the time of loading, 26 U.S.C. § 4461(c)(2)(A), and is based on the value of the

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[3] Many "port users" are not subject to the HMT, as numerous exemptions exist in the statute. These include intraport movements of cargo, port use by the U.S. Government, humanitarian and development assistance cargo, fish or other aquatic animals not previously landed on shore, bunker fuel, ship's stores, and any cargo shipped between the continental United States and Alaska, Hawaii or any U.S. possession for ultimate consumption at its destination (with the exception of crude oil transported from Alaska). 26 U.S.C. § 4462.

goods as determined by the standard commercial export documentation, 26 U.S.C. § 4462(a)(5)(A). *See also* 19 C.F.R. § 24.24(e)(2)(i).

The Court of Appeals also upheld the CIT's determination that the HMT is not a user fee under *Massachusetts* because it is not based on a fair approximation of use. (App. 23a). The Court of Appeals distinguished cases relied on by the Government in which *ad valorem* fees were upheld, *United States v. Sperry Corp.*, 493 U.S. 52 (1989), and *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). The court noted that exporters are not assured harbor maintenance at the harbor where their goods are loaded, and the HMT, as imposed on exports, is paid by indirect users of the harbors — exporters, rather than the direct users — the ship owners. (App. 19a-21a). The court further observed that because *Sperry* involved a suit under the Just Compensation Clause, the standard for upholding the assessment in that case was less strict than the standard that applies under the Commerce Clause. The Court of Appeals noted that "per *IBM*, the Export Clause is still more restrictive." (App. 19a-20a).

Finally, the Court of Appeals rejected the Government's contention that "fair approximation of use" refers to "the value of the benefits received" as opposed to "the costs of the benefits received." The court noted: (1) the *Massachusetts* case itself suggests that the value of the benefits is not the appropriate measure; (2) higher value merchandise does not always correlate to a higher profit margin; (3) exporters are forced to pay for harbor maintenance nationwide even though they receive no benefits from harbors other than the one they use; and (4) the HMT does not pay for services such as police, fire or rescue units, which provide benefits to exporters by keeping harbors safe whether the exporters use those services or not. (App. 21a-22a).

REASONS FOR DENYING THE WRIT

1. The Lower Courts Correctly Ruled That This Case Is Governed By Last Year's Decision In *United States v. IBM*. The Government Has Shown No Basis For Yet Another Review Of The Export Clause At This Time.

Just one year ago, this Court engaged in an exhaustive analysis of the rarely litigated Export Clause. In *IBM*, the Court reaffirmed almost a century of Export Clause jurisprudence[4] and ruled that the Export Clause prohibits the application of even generally applicable federal taxes on export shipments, stating that "the Export Clause strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation." 116 S. Ct. at 1797. The Court also emphasized that the term "tax," as used in the Export Clause context, should be given its "common, and usually expansive" meaning. *Id.* at 1802.

All parties to the instant case, as well as the Court of Appeals, recognized from the outset the significance of the Court's decision in *IBM* for this litigation. Notably, the Government moved for, and was granted, a stay of this case at the Court of Appeals pending this Court's decision in *IBM*. At the outset of its discussion on the merits, the Court of Appeals recognized that this Court "recently analyzed the Export Clause" in *IBM*, holding "that the Export Clause does not permit 'the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit.'" (App. 15a, *quoting IBM*, 116 S. Ct. at 1795).

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[4] Including *Fairbank v. United States*, 181 U.S. 283 (1901); *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915); *United States v. Hvoslef*, 237 U.S. 1 (1915); and *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923).

In its petition for a writ of certiorari in *IBM*, the Government had specifically argued as a reason for granting the writ in that case that the Court's decision there would have significance for the case at bar. Referring to the HMT as a tax subject to the Export Clause, the Government stated:

> The question presented in this case is of substantial recurring importance. The proper scope of the Export Clause has significance not only for the tax imposed under Section 4371 *but also for other nondiscriminatory federal taxes of general application. For example, Section 4461 imposes on all shippers a "tax on any port use" of 0.125 percent of the value of all commercial cargo loaded or unloaded in United States ports*. See 26 U.S.C. 4461(a), (b) (Supp. V 1993), 4462(a)(1). Approximately 700 cases are currently pending in the United States Court of International Trade challenging the constitutionality of that statute under the Export Clause. See *United States Shoe Corp. v. United States*, No. 94-11-00668 (Ct. Int. Trade).

Petition for Writ of Certiorari at 13-14, *United States v. International Business Machines Corp.*, Docket No. 95-591 (emphasis added). In this light, it is telling that the Government's petition in this case is devoid of even a mention of *IBM*.

The Court of Appeals applied *IBM* (App. 15a-16a) and correctly determined that the HMT is a prohibited tax on exports, recognizing that the HMT statute itself, 26 U.S.C. § 4461, repeatedly refers to the HMT as a tax, and is codified in the Internal Revenue Code. (App. 17a). The HMT also operates as a tax. While facially the HMT is imposed on any "port use," the statute defines "port use" as the loading or unloading of commercial cargo on or from a commercial vessel at a port. Thus, the tax is applied without regard to size of the vessel, manner or extent of use of port facilities, or the condition of the particular port. (App. 49a). It is not

the vessel operator or carrier who is liable for the tax, but rather the exporter. 26 U.S.C. § 4461(c)(1)(B). *See also*, S. Rep. No. 126, 99th Cong., 1st Sess. 9 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647 (the HMT "is not on the harbor, nor is it on the vessel's operator or owner. The tax is set on the value of the cargo, and is to be paid by the owner of the cargo, or his agent."). As the assessment of the HMT is at an *ad valorem* rate against the value of cargo loaded on board vessel for export (26 U.S.C. § 4461(b)), the HMT is a direct tax on the exported article.[5]

This case thus does *not* present the issue reserved for "another day" in *IBM*, *i.e.*, whether a particular assessment on an activity or service is so closely connected to the goods as to amount to a tax on the goods themselves. 116 S. Ct. at 1804. The HMT is not merely "essentially" a tax on the goods themselves (the situation presented by the insurance policy tax in *IBM*, 116 S. Ct. at 1803); as the Court of Appeals determined, it *is* a direct tax on the export goods themselves. (App. 24a).[6] Thus, the case for the

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[5] Although the Government seeks to convey the impression that the legislative history of the HMT statute was clear, demonstrating that Congress understood the HMT to be a user fee rather than a tax (Pet. 14 and 23), this is belied by the terms of the statute itself and by legislative history which reveals doubts about the HMT's constitutionality. The "legislative history reflects that the drafters of the Act were abundantly aware of the constitutional infirmity of the Act." (App. 84a) (Musgrave, J., concurring). *See, e.g.*, H.R. Rep. No. 251(IV), 99th Cong., 1st Sess. 23, 41-42 (1985).

[6] Accordingly, this case does not raise the concerns addressed in Justice Kennedy's dissenting opinion in *IBM*, which concludes that the Framers did not understand the Export Clause to prohibit taxes on services such as insurance that may have an *indirect* effect on the export process. *IBM*, 116 S. Ct. at 1809. The applicability of the Export Clause's strict prohibition to the HMT is clear and is much stronger than in the case of the insurance at issue in *IBM*. The HMT is an *ad valorem* tax imposed

unconstitutionality of the HMT is even more compelling than that for the tax found objectionable in *IBM*.

Because the Court has recently considered and ruled on the scope of the Export Clause, and because the decisions below present nothing new and are wholly consistent with relevant precedent of this Court, the petition should be denied.

2. The Lower Courts Correctly Analyzed The Factual Record To Conclude That The Harbor Maintenance Tax Is Not A "User Fee" Outside The Scope Of The Export Clause. The Government's Counter-Arguments, All Considered And Rejected By The Courts Below, Are Not Supported By The Record.

Having lost the key battle of *IBM*, the Government is relegated to arguing that the Harbor Maintenance Tax is a "user fee" and not a "tax or duty," and hence outside the scope of Export Clause protection. Two expert and specialized lower courts — the Court of International Trade and the Court of Appeals for the Federal Circuit — both rejected this argument. Indeed, the Government lost by a lopsided majority of seven judges to one. Only a single dissenter on the Court of Appeals' five-judge panel, and no judges on the CIT's three-judge panel, accepted the Government's claim that the record allowed the Harbor Maintenance Tax to be characterized as a "user fee."[7]

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directly on export cargo, as opposed to on a service or instrument associated with export.

[7] To the extent that the Government is arguing that legislation enacted pursuant to Commerce Clause authority can impinge on the explicit prohibition in the Export Clause against federal taxation (*see* Pet. 13-14 n.3), that argument was correctly rejected by the Court of Appeals. (App. 25a-29a). "The text of the Export Clause... expressly prohibits Congress from laying any tax or duty on exports," and general Commerce Clause

While recognizing that the Export Clause might well require a standard even less favorable to the Government (*see, e.g.*, App. 19a-20a discussing *IBM)*, the two lower courts applied the three-part test of *Massachusetts v. United States*, 435 U.S. 444 (1978).[8] The Government does not claim that the lower courts applied the wrong standard, but argues only that they erred in its application. This is in substantial part a fact-specific inquiry, and there is no reason for this Court to engage in the same application-of-law analysis for yet a third time.

Furthermore, the record here does not support the legal arguments that the Government advances. For example, with respect to the requirement of *Massachusetts* that revenues not be excessive in relation to the cost of governmental benefits conferred (435 U.S. at 464), the Government states that the Harbor Maintenance Trust Fund "has provided *approximately*

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jurisprudence cannot override that express prohibition. *IBM*, 116 S. Ct. at 1799. *See also North American Co. v. SEC*, 327 U.S. 686, 704-05 (1946) (congressional power under the Commerce Clause "is limited by express provisions in other parts of the Constitution"). Even assuming, *arguendo*, that the HMT is appended to an otherwise valid regulatory program, that fact is irrelevant:

> [T]he freedom of exportation being guaranteed by the Constitution it cannot be disturbed by *any form* of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance.

Fairbank v. United States, 181 U.S. at 295 (emphasis added).

[8] *Massachusetts* involved the question whether a federal aircraft registration fee violated the intergovernmental tax immunity doctrine. As the Court of Appeals recognized, the Export Clause is particularly restrictive. *See* App. 19a-20a, noting that in *United States v. Sperry Corp.*, 493 U.S. 52, 61 n.7 (1989), the Court recognized that the standard under the Just Compensation Clause is less strict than that under the Commerce Clause, and, that "per *IBM*, the Export Clause is still more restrictive." (App. 19a-20a, *citing* 116 S. Ct. at 1799).

100 percent" of the funds currently used for harbor maintenance (Pet. 6 n.1; emphasis added) and that the fund's "current[]... positive balance" can be explained by year-to-year fluctuations in needs (*id.* 15-16 and 17 n.4). But the record contains no evidence remotely suggesting that the current (and growing) fund surplus is temporary or related in any way to projected maintenance needs.

To the contrary, as the CIT found, since its inception the HMT has generated revenues far in excess of total costs, as demonstrated by the ever-growing surplus accumulated in the Trust Fund. (App. 51a). *See supra* p. 4. As the CIT further noted, even as to possible future application of the Fund, the HMT "is used to fund projects yet to be commenced, *or even envisioned*, rather than to repay the government for services rendered." (App. 60a) (emphasis added). As the Executive Branch has itself recognized, the surplus is of "continu[ing]" and "growing" concern. *1995-96 Annual Report* at 7-8.[9]

The Government also states that revenues collected under the HMT are "deposited in the Harbor Maintenance Trust Fund" (Pet. 5; *see also id.* 15) and "may not be used to support the general welfare" (Pet. 15). This is not accurate, and in any event tells only half the story. Funds received by the Customs Service are in fact deposited into the general United States Treasury (App. 70a), and then an "equivalent amount" is appropriated into the Trust Fund. 26 U.S.C. § 9505. Some of the Trust Fund is then expended for maintenance, but an increasing amount remains unexpended. This surplus is then invested in Government obligations (26 U.S.C. § 9602(b)(1)) and thereby returned to the Treasury for general public use. The Trust Fund, accordingly, serves only as a conduit from and to the general Treasury.

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[9] Even Judge Mayer, the sole dissenting judge below, found that the Trust Fund's large and ever-growing surplus was "troubling." (App. 43a).

Additionally, as the CIT noted, HMT proceeds are included "on budget" in calculating Government tax receipts and thus used to offset Government deficit calculations. This, in turn, decreases the need for Treasury borrowings to finance the deficit. (App. 51a). For all practical purposes, therefore, revenues from the Harbor Maintenance Tax are used for general public purposes in the same manner as they would if no Trust Fund existed at all.

Even with respect to those portions of the Trust Fund that are used for harbor maintenance, these provide a broad public service that historically was funded from general tax revenues. *See* S. Rep. No. 228, 99th Cong., 1st Sess. 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6709 ("Historically, Federal expenditures for development and operations and maintenance of harbors and ports have been financed from general revenues."). The HMT simply substituted one "tax" for another. *See* S. Rep. No. 126 at 2, *reprinted in* 1986 U.S.C.C.A.N. at 6640 (describing the HMT as "a new *tax* to cover a portion of Federal spending on harbor maintenance") (emphasis added).[10]

The very nature of the HMT — an *ad valorem* tax assessed upon the loading of exports for shipment abroad — is compelling evidence against the Government's user fee argument. With regard to the requirement of *Massachusetts*

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[10] Moreover, even payments made from the Trust Fund are for uses well beyond mere harbor maintenance. For example, Trust Fund revenues are used for St. Lawrence Seaway Development Corporation rent payments which are transferred to the Department of Transportation. *See Third Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1994* at 2 (1995). Additionally, the National Oceanic and Atmospheric Administration is a potential recipient of funds from the Trust Fund, for activities such as the creation of navigation charts and marine weather forecasting. *See 1995-96 Annual Report* at 3; *see also* App. 51a, *citing* Office of Management and Budget, Executive Office of the President, *FY 1996: Budget of the U.S. Government, Appendix*, 376, 802 (1995).

that the charge must be based upon a fair approximation of use, the Court of Appeals correctly found that there is no correlation between the amount of HMT an exporter pays and amount of port usage. The HMT is computed *ad valorem* against the value of the cargo, irrespective of its weight, size and use of the port. Exporters and importers of low-value, high-bulk cargo, who necessarily require deep draft vessels and a correspondingly greater degree of dredging, use port facilities to a much greater extent than exporters and importers of high-value, low-bulk cargo, who need only a shallow draft harbor, yet the former pay less HMT than the latter. Moreover, many parties who use the harbor pay no HMT (*see, e.g., supra* note 3, listing HMT exemptions).

The Army Corps of Engineers has acknowledged that there is "*no relationship* between the amount of money spent on a port's maintenance, and the amount of revenue collected from cargo moving in or out of that particular port." Army Corps of Engineers, *Briefing Book and Fact Sheets on the Harbor Maintenance Fee and Trust Fund* at 1 (Feb. 14, 1990) (emphasis added). Moreover, most large ports paying the majority of the costs receive no more than 30% back in maintenance expenditures. (App. 60a, *citing* Army Corps of Engineers, *Estimated Receipts of Harbor Maintenance Fee from Cargo Transiting Major Ports* (1992) (draft document)). In one notable example, of an estimated $78,711,000 in 1992 taxes on exports and imports collected from the Port of Los Angeles, only $162,000 was returned in port operation expenditures. *Id.*

The Government contends that by imposing the HMT "on an *ad valorem* basis, Congress rationally concluded that shippers of higher value cargo would receive greater benefits (*e.g.*, greater profits)" from port maintenance. (Pet. 23). This demonstrates that the HMT is not tied in any way to specific use or benefit, but rather, like a tax, is imposed on a taxpayer based on a presumed profit margin and a presumed corresponding ability to pay. In any event, the Court of

Appeals properly observed that "the government has failed to present any facts that would suggest that, even on average," higher value merchandise correlates with a higher profit margin. (App. 22a). Profit on goods is not a function of the value of the goods; it is a function of the mark-up. One exporter may take a $100,000 loss on a cargo of precious gems valued at $10 million, while another may make a $100,000 profit on cargo of cement valued at $1 million. Thus, the Government's own argument reinforces the conclusion that the HMT does not approximate use of harbor facilities, but is instead a traditional *ad valorem* tax which bears no relation to the benefit the taxpayer derives from the tax.[11]

Contrary to the Government's assertion (Pet. 21), the Court of Appeals heeded this Court's admonition that the validity of a charge is to be "judged by its result, not its formula." The Court of Appeals did not find that the HMT is not based on a fair approximation of use simply because it is assessed *ad valorem*. Rather, the court examined the results that follow from the *ad valorem* application of the tax and properly concluded that the HMT is not based upon a fair approximation of use. Nor did the Court of Appeals insist on a "precise calibration" of the HMT to port use in contravention of *Sperry*. The court, after analyzing the application of the tax, recognized that there is no reasonable correlation between the amount of HMT and the amount of

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[11] In regard to the "benefit" provided, Congress pertinently stated: "These fees and taxes offset services rendered to *vessels*." S. Rep. No. 126 at 7, *reprinted in* 1986 U.S.C.C.A.N. at 6644 (emphasis added). Thus, not only are exporters paying a tax based on their presumed ability to pay; they are paying a tax for services "rendered to vessels."

port use.[12] Indeed, the Court of Appeals actually gave the Government the benefit of any doubt and concluded that even if the "fair approximation of use" test refers, as the Government contended, to the *value* of the benefits received rather than the *costs* of the benefits received, the HMT still would not be a fair approximation.[13] (App. 21a-22a).

In short, both courts below correctly applied this Court's precedent and properly found that the HMT on exports is a tax rather than a user fee.[14]

3. The Government's Allegation Of Fiscal Impact Does Not Warrant Granting The Petition.

The Government points to the "fiscal importance" of this case as a reason for granting certiorari (Pet. 12 and 25) but, significantly, has not placed this case in its full context. The Trust Fund has amassed a huge surplus, $865 million as of

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[12] The Government's observation that flat registration fees or "rough approximations" have been countenanced by the Court in certain cases (Pet. 20-21) begs the question. In the HMT context, the lower courts properly found there is absolutely no relationship to port usage.

[13] This is illustrative of the comprehensive, multi-faceted examination performed by the Court of Appeals. Yet the Government's petition ignores many of the grounds that led to the court's decision, namely, the fact that exporters are not assured harbor maintenance at the harbor where their goods are loaded (App. 21a); the stricter examination called for under the Export Clause as compared to the Commerce Clause or the Just Compensation Clause (App. 19a-20a); and the fact that the HMT does not pay for services, such as police services, which provide benefits to exporters by keeping the harbors safe whether the exporters use those services or not (App. 22a).

[14] The HMT also fails the first prong of *Massachusetts* as it discriminates against exporters. The many exemptions in the HMT statute (*see supra* note 3) demonstrate that the HMT is discriminatorily imposed on exporters. Many exempt parties benefit from harbor maintenance projects, as does the general public, yet they do not pay HMT.

fiscal year 1996, which is projected to grow to almost $3 billion in just a few years. *1995-96 Annual Report* at 7. In this regard, the vast bulk of HMT is not within the scope of this case (*id.* at 4) and will not be affected by its outcome. Recognizing concerns about the constitutionality of the HMT on exports, Congress included a severability clause in the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082, 4201 (codified at 33 U.S.C. § 2304).[15] In another HMT case, involving the tax as imposed on passengers, the CIT reviewed the severability clause and held that the HMT as applied to exports is severable from the remaining portions of the statute. *Carnival Cruise Lines, Inc. v. United States*, 929 F. Supp. 1570 (Ct. Int'l Trade 1996). Accordingly, collections as to imports, domestic shipments, passenger services, and admissions to foreign trade zones are all unaffected by this case.

Moreover, a significant portion of the HMT collected on exports will be unaffected as well. The CIT has previously denied attempts to have the HMT litigation certified as a class action. *Baxter Healthcare Corp. v. United States*, 925 F. Supp. 794 (Ct. Int'l Trade 1996). In order to recover HMT payments, therefore, exporters must file lawsuits on an individual basis. While approximately 4,000 cases have been filed in the CIT (numerous plaintiffs have filed multiple actions), many exporters have not filed suit and, therefore,

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[15] With respect to the inclusion of a severability clause, the House Committee on Merchant Marine and Fisheries noted:

> The concern of the Committee and the subject of the [severability clause] amendment was, for example, that the constitutional arguments that had been made against imposing a tax on exports might result in the legislation being declared invalid and it was the desire of the Committee to preserve all other provisions of the Act if that or a similar provision be found invalid.

H.R. Rep. No. 251(IV) at 30.

may be precluded from recovering past payments. Thus, the Government's potential exposure is not as open-ended as might appear at first blush.

Finally, if Congress deems it necessary, it can take steps to ameliorate any effect this case has on future revenue by enacting a *bona fide* user fee to replace the HMT on exports. There are many ways by which this could be done. One possible approach is illustrated by the Harbor Development and Navigation Improvement Act of 1986, enacted as part of the same legislative package that included the HMT. That Act authorizes States to "levy port or harbor dues (in the form of tonnage duties or fees) on a vessel engaged in trade entering or departing from a harbor and on cargo loaded on or unloaded from [the] vessel." 33 U.S.C. § 2236(a). That Act permits the imposition of fees only for certain projects and services and only on certain ships that are comparable in size to those that benefitted from the particular project. The Act identifies specific factors for setting fees such as "elapsed time of passage, safety of passage, vessel economy of scale, under keel clearance, vessel draft, vessel squat, vessel speed, sinkage, and trim." 33 U.S.C. § 2236(a)(3)(B). States can impose the fee only "on a fair and equitable basis" considering "the direct and indirect cost of construction, operations, and maintenance, and providing the facilities and services [listed]; the value of those facilities and services to the vessel and cargo; [and] the public policy or interest served ...." 33 U.S.C. § 2236(a)(4).

Although the Government argues that any alternative to the *ad valorem* HMT would entail unreasonable administrative costs and burdens (Pet. 22-23), Congress plainly concluded that the alternative approach of the Harbor Development and Navigation Improvement Act could readily be administered by the States. It also shows that Congress knows how to authorize a *bona fide* user fee, and it can do so here to replace the unconstitutional burdens on exporters now imposed by the HMT.

CONCLUSION

The petition for a writ of certiorari should be denied.

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No. 97-372

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES SHOE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-372

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES SHOE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. a. Respondent is incorrect in contending that this case is "governed" (Br. in Opp. 9) by this Court's recent decision in *United States* v. *International Business Machines Corp.*, 116 S. Ct. 1793 (1996). In the *IBM* case, the Court held that a federal tax imposed on goods for export is invalid under the Export Clause of the Constitution even if the tax is levied without discrimination on both imports and exports alike. 116 S. Ct. at 1797. As the court of appeals noted, in light of that holding, it is not disputed in the present case that, "if the [Harbor Maintenance Tax] is a tax on goods in export transit, it is invalid" (Pet. App. 16a).

As the court of appeals recognized, this case addresses a distinctly different question than was presented in *IBM*. The question presented in this case is whether the charges imposed by the Harbor Maintenance Tax constitute a "permissible user fee" that seeks to recover the costs of providing federal services (Pet. App. 16a, 23a). This Court has long recognized the distinction that exists between an unconstitutional tax on exports and a permissible user fee that exacts "compensation * * * for services properly rendered." *Fairbank* v. *United States*, 181 U.S. 283, 304 (1901). The court of appeals correctly understood that the proper boundaries of this distinction were not at issue in the *IBM* case. Instead, as the court of appeals acknowledged (Pet. App. 16a-23a), the distinction between unconstitutional taxes on exports and permissible fees for goods in transit is governed by the standards established by this Court in cases such as *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), *Massachusetts* v. *United States*, 435 U.S. 444 (1978), and *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989).

This Court's decision in *IBM* thus plainly does not "govern" this case. That decision neither considers nor resolves the question whether a charge assessed on the use of the ports of the United States is "a permissible user fee" rather than a constitutionally proscribed tax (Pet. App. 23a).[1]

[1] At an earlier stage of this case, the government argued that, even if the Harbor Maintenance Tax were regarded as a "tax" rather than a "user fee" (Pet. App. 23a), this assessment would nonetheless be constitutional because it applies without discrimination to exports and imports alike. During the pendency of this litigation, this Court rejected an indistinguishable contention in the *IBM* case (116 S. Ct. at 1795). The government has therefore abandoned that position in this case and now raises only the claim that the Harbor Maintenance Tax is "a permissible user fee" under the analysis of cases such as *United States* v. *Sperry Corp.*, *supra*, and *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, *supra*. See Pet. 12-25. Because the government contends only that the port use charge is "a permissible user fee" (Pet. App. 23a), it obviously is not "telling that the Government's petition in this case is devoid of even a mention of *IBM*" (Br. in Opp. 10).

The opinion below does not support respondent's statement that, in deciding whether or not the charge is a "prohibited tax" or a "permissible user fee" (Pet. App. 23a), "[t]he Court of Appeals applied *IBM*" (Br. in Opp. 10). To the contrary, in the course of deciding whether the charge is a proscribed tax or a permissible fee, the court of appeals "applied" (although in an incorrect fashion) this Court's decisions in *United States* v. *Sperry Corp.*, *supra*, *Massachusetts* v. *United States*, *supra*, and *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, *supra*. See Pet. App. 16a-23a.

b. Indeed, respondent ultimately acknowledges (Br. in Opp. 12-13 & n.8) that the question whether the Harbor Maintenance Tax is "a permissible user fee" rather than a proscribed tax turns on the analysis applied by this Court in *United States* v. *Sperry Corp.*, *supra*, and *Massachusetts* v. *United States*, *supra*. Respondent contends, however, that applying these decisions to determine the constitutionality of the Harbor Maintenance Tax is merely "a fact-specific inquiry" that does not warrant this Court's review (Br. in Opp. 13). That contention is not correct.

The proper application of the constitutional tests established by this Court to distinguish between a proscribed tax and a permissible user fee presents questions of law, not of fact. For example, in holding

the Harbor Maintenance Tax unconstitutional, the court of appeals relied greatly on the fact that the fee is based upon the value of the goods shipped, rather than on tonnage or other similar factors (Pet. App. 17a-18a). In so holding, the decision of the court of appeals conflicts with this Court's approval of an *ad valorem* user fee in *United States* v. *Sperry Corp.*, 493 U.S. at 60, and disregards this Court's frequent admonition that a constitutionally permissible fee need not "be precisely calibrated to the use that a party makes of Government services." *Ibid.* See also *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 545 (1950); Pet. 20-21.

The court of appeals also stated that it was constitutionally objectionable that the port use fee is imposed directly on shippers rather than on the vessel owners (Pet. App. 19a). In doing so, the court of appeals failed to honor this Court's clear holding in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. at 714, that it is "not * * * particularly important whether the charge is imposed on the passenger himself, to be collected by the airline, or on the airline, to be passed on to the passenger if it chooses." As this Court emphasized in *Evansville*, the fee may be imposed either on the person who engages the transportation service or the person who provides that service because, in either case, it is the "use of * * * [federal] facilities that give[s] rise to the obligation." *Ibid.*

c. Respondent ultimately acknowledges that Congress *could* have adopted a permissible user fee for port facilities. Respondent contends only that such a fee should be based upon tonnage or other factors that respondent thinks might more closely relate the costs to be recovered to the benefits conferred (Br. in

Opp. 20).[2] As Judge Mayer emphasized in dissent (Pet. App. 39a), however, Congress rationally determined that an *ad valorem* fee was "the only acceptable basis on which to impose such charges" for port services (S. Rep. No. 228, 99th Cong., 1st Sess. 5-6 (1986)). In rejecting that determination, the court of appeals failed to honor the wide "latitude of discretion which the legislature is entitled to exercise in the selection of the" method for calculating a fee. *Fairbank* v. *United States*, 181 U.S. at 304. See also Pet. 23-24.[3]

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[2] Respondent states that Congress could enact "a *bona fide* user fee to replace" the Harbor Maintenance Tax and that "[t]here are many ways by which this could be done" (Br. in Opp. 20).

[3] Respondent disputes that "Congress understood the [Harbor Maintenance Tax] to be a user fee rather than a tax" (Br. in Opp. 11 n.5). Respondent claims that the history of this legislation "reveals doubts" about its constitutionality (*ibid.*). It is true that the report of the House Committee on Merchant Marine and Fisheries expressed the concern that the port use charge could be deemed unconstitutional if it were viewed as a revenue raising measure. H.R. Rep. No. 251, 99th Cong., 1st Sess., Pt. 4, at 23 (1985). The Committee explained, however, that the fee is constitutional because it "is, in fact, intended as a fee that is reasonably related to the services financed by the fee." *Id.* at 24. Congress consistently expressed the understanding that the "port user charges" imposed by this provision represent a user fee, rather than a "tax," in the constitutional sense. See, *e.g.*, S. Rep. No. 228, *supra*, at 5.

Respondent also asserts that the port use fee is a "tax" rather than a "fee" because the word "tax" appears in its text and title and it is codified in the Internal Revenue Code (Br. in Opp. 11 n.5). This Court has frequently noted, however, that, in determining whether a user fee is permissible or proscribed, the name of the exaction is immaterial, for the Constitution "regard[s] things rather than names." *Fairbank*

d. Respondent errs in contending (Br. in Opp. 14-15) that the port use charge is constitutionally defective because the Harbor Maintenance Trust Fund, to which the fees are deposited, enjoys a positive balance. In *Massachusetts* v. *United States*, 435 U.S. at 470 n.25, this Court rejected the contention that a surplus in a trust fund for the provision of federal services makes the government fee for such services unconstitutional. See also Pet. 17 n.4.[4] Respondent fails to address that holding in reurging the same contention here. See Br. in Opp. 14-15.

2. In holding the Harbor Maintenance Tax unconstitutional as a tax on exports, the Federal Circuit has thus seriously misapplied the precedents of this Court. This misapplication of the "high prerogative of declaring invalid an act of Congress" (*Untermyer* v. *Anderson*, 276 U.S. 440, 453 (1928) (Brandeis, J., dissenting)) warrants review by this Court.

Respondent does not dispute that the port use fees for which refunds are sought in the 4000 pending cases exceed several hundred million dollars. Those fees were designated by Congress solely and specifically for the development and operation of the Nation's port facilities. Congress enacted this statutory fee as an essential component of the complex legislative plan adopted in the Water Resources Development Act for the operation and improvement of vital but long-neglected port facilities. See, *e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985); H.R. Rep. No. 251, *supra*, Pt. 4, at 42; 132 Cong. Rec. 4921-4923 (1986) (Sen. Abdnor); *id.* at 4937-4938, 4940 (Sen. Moynihan); *id.* at 4958-4959 (Sen. Bentsen). By misapplying constitutional precedent, the court of appeals has torn apart this carefully designed legislative scheme for the funding and operation of the Nation's ports. Review by this Court is warranted to protect the "obvious interest [of Congress] in making those who specifically benefit from its services pay the cost" (*Massachusetts* v. *United States*, 435 U.S. at 462).

* * * * *

For the reasons stated above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

SETH P. WAXMAN
Acting Solicitor General

OCTOBER 1997

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v. *United States*, 181 U.S. at 304 (quoting *Pace* v. *Burgess*, 92 U.S. 372, 376 (1876)).

[4] Moreover, respondent has misdescribed the use that may be made of the current surplus in this trust fund. Respondent states that the "surplus is * * * invested in Government obligations (26 U.S.C. § 9602(b)(1)) and thereby returned to the Treasury for general public use" (Br. in Opp. 14). The fact that the trustee is to invest the trust funds "in interest-bearing obligations of the United States" (26 U.S.C. 9602(b)(1)) obviously does not mean that the trust funds are "for general public use." Instead, just as is the case when any *other* investor purchases government bonds, the interest earned on the bonds is paid to the trust and is not retained by the United States. 26 U.S.C. 9505(a)(3); 26 U.S.C. 9602(b)(3).

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In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES SHOE CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED
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UNITED STATES COURT OF
INTERNATIONAL TRADE

Docket No. 94-11-00668

UNITED STATES SHOE CORPORATION, PLAINTIFF

v.

UNITED STATES

DOCKET ENTRIES

1994			
Nov.	3	(1)	Summons filed.
	3	(2)	Complaint filed.
	10	(3)	ASSIGNED TO 3 JUDGE PANEL Chief Judge DiCarlo, Judge Restani, Judge Musrave
1995			
Jan.	4	(4)	Deft filed consent motion for EOT until 2-2-95 to respond to pltf's complaint.
	5	(5)	Deft's motion for EOT until Feb 2/95 GRANTED.

Feb. 13 (6) Deft filed motion for EOT out of time until Mar 4/95 to respond to Pltf's Complaint.

15 (7) As per Slip op. 95-23 of 2-15-95 pltf and deft shall file concurrent cross-motions for summary judgment addressing issues set forth in order. Cross motions and supporting briefs shall be filed by 4-14-95. Pltf's whose actions are listed on attached schedules shall be allowed to file Amicus Curiae brief provided they file notice to that effect within 30 days of instant order. Parties shall notify court within 30 days of instant order if there are any other factual issues other than those described in paragraph 2 of instant order. Deft may file responsive brief within 60 days after Amicus Curiae briefs are filed.

15 As per Slip Op 95-23 of 2-15-95 all action is stayed in this action until further direction of the court. W/94-11-00668

27 (8) JEFFREY H. PFEFFER, ESQ., STEVEN R. SOSNOV, ESQ and THOMAS J. KOVARICIK, ESQ, of IRVING A. MANDEL filed notice to participate as amicus curiae and oral argument as well.

23 (9) STEVEN P. FLORSHEIM and ERIK D. SMITHWEISS of GRUNFELD, DESIDERIO, LEBOWITZ & SILVERMAN, filed notice to participate as amicus curiae through the filing of a single brief and participation in oral argument.

28 (10) PATRICK D. GILL of RODE & QUALEY filed notice that he will participate as amicus curiae, through the filing of a single brief and participation in oral argument.

Mar. 3 (11) STEVEN H. BECKER of COUDERT BROTHERS filed notice to participate as amicus curiae, through the filing of a single brief and participation in oral argument.

Feb. 24 (12) PETER J. ALLEN of NEVILLE, PETERSON & WILLIAMS filed notice to appear as amicus curiae by the filing of briefs and participation in oral argument.

Mar. 6 (13) Plaintiff United States Shoe Corporation and related case plaintiffs filed motion to modify the 2-15-95 scheduling order (Slip. Op. 95-23) to provide 60 days within which to obtain access to relevant and material facts in possession of the Government.

7 (14) Plaintiff's motion (#13) DENIED as proscribed by the stay order in paragraph #1 without prejudice to such relief as plaintiff may seek, pursuant to Rule 56(e) upon the hearing of the oral argument of the concurrent cross-motions. With respect to the related actions, the motion is denied as proscribed by paragraph "1" of the scheduling order.

7 (15) Barry E. Cohen of CROWELL & MORING filed notice to participate as amicus curiae through filing of a brief and participation in oral argument.

7 (16) LYNN S. BAKER and MICHAIL E. ROLL of KATTEN MUCHIN & ZAVIS filed notice that they will participate as amicus curiae on behalf of BAXTER HEALTHCARE CORPORATION, THE NUTRASWEET COMPANY AND NESTLE U.S.A. INC. through the filing of a single brief and participation in oral argument

7 (17) ROBERT E. BURKE of BARNES, RICHARDSON & COLBURN filed notice to participate as amicus curiae, in addition they wish to participate in oral argument.

15 (18) JOHN B. REHM and MUNFORD PAGE HALL, II of DORSEY & WHITNEY filed Notice to participate as amicus curiae, through the filing of a single brief and participation in oral argument.

16 (19) J. KEVIN HORGAN of DEKIEFFER DIBBLE & HORGAN filed notice to participate as amicus curiae, through the filing of a brief and participation in oral argument.

14 (20) MELVIN S. SCHWECHTER of LEBOEUF, LAMB, GREENE & MACRAE, filed notice to participate as amicus curiae through the filing of a brief and participation in oral argument, on behalf of ALUMINUM COMPANY of AMERICA ET AL., Pltfs in cases No. 95-01-00033 and 95-02-00163.

14 (21) Matthew McGrath of Barnes, Richardson & Colburn filed notice to participate as amicus curiae on behalf of Polaroid Corporation by filing a brief and appearing at oral argument.

13 (22) William Outman II of Baker and McKenzie filed a notice to participate as amicus curiae and appearing at oral argument.

17 (23) Equiptment & Parts Export, Inc., by its attorneys Donohue & Donohue filed a motion for leave to participate as an amicus curiae.

17 (24) Swisher International, by its attorneys McKenna & Cuneo filed a motion for leave to participate as an amicus Curiae.

24 (25) Defendant, U.S.A., filed opposition to Equiptment & Parts Export, Inc. and Swisher International's motion for leave to participate as amicus curiae.

28 (26) Equiptment and Parts Export, Inc.'s motion for leave to participate as an amicus curiae DENIED.

28 (27) Swisher International's motion for leave to participate as an amicus curiae DENIED.

Apr. 14 (28) General Chemical Corporation filed its amicus curiae brief.

14 (29) Texaco Refining and Marketing, Inc. filed its amicus curiae brief.

14 (30) Amoco Chemical Company filed its amicus curiae brief.

14 (31) Plaintiff, U.S. Shoe Corporation, filed its motion for summary judgment and brief in support.

14 (32) Polaroid Corporation filed its amicus curiae brief (BR&C)

14 (33) Defendant, U.S.A., filed its motion for Summary Judgment.

14 (34) Aris-Isotoner, by Neville, Peterson & Williams, filed Amicus Curiae brief

14 (35) Armstrong World Industries, by DeKieffer, Dibble & Horgan filed notice stating their agreement with the brief of plaintiff, U.S. Shoe Corporation, and withdrawal of intent to participate at oral argument.

14 (36) New Holland North America, by Dorsey and Whitney, filed brief indicating agreement with the brief of ptlf. U.S. Shoe Corporation.

14 (37) Allied Textiles Sales Company, by Irving A. Mandel, filed its amicus curiae brief.

14 (38) Baker & McKenzie; Leboeuf, Lamb Greene & MacRae and Crowell & Moring filed joint amicus curiae brief on behalf of their clients.

14 (39) Katten, Muchin & Zavis filed their amicus curiae on behalf of their clients.

14 (40) Grunfeld, Desiderio, Lebowitz & Silverman filed amicus curiae brief on behalf of their clients.

May 12 (41) Swisher International, by its attorneys McKenna & Cuneo, filed a motion for permission to appear as amicus curiae and participate in oral argument.

12 (42) Swisher International's motion for leave to participate as amicus and appear at oral argument GRANTED.

15 (43) Pltf filed response to Deft's proposed findings of uncontroverted fact.

15 (44) Deft filed response to Pltf's statement of material facts (Memorandum attached).

June 13 (45) Deft filed memorandum in opposition to briefs of amici curiae.

16 (46) Deft filed memorandum in opposition to briefs of amici curiae (corrected version).

26 (47) Deft filed compendium of materials relied upon by the USA.

July 12 (48) Transcript of Oral Argument of June 27, 1995 filed with the court.

Aug. 8 (49) Deft filed motion for leave to submit supplemental memorandum.

16 (50) Pltf's and amici curiae'e filed joint opposition to deft's motion for leave to submit supplemental memorandum.

22 (51) Deft's motion for leave to file a Supplemental Memo addressing the decision of the CAFC in *I.B.M. Corp v. United States*, No. 94-5164 (JULY 10/95) DENIED IN FULL.

Oct. 25 (52) Slip Op. 95-173 [On cross-motions, summary judgment for the plaintiff.]

Nov. 14 (53) Pltf filed proposed judgments.

13 (54) Deft's filed motion to stay pending appeal.

27 (55) Pltf Allied Textiles Sales Co., Inc. Et Al filed motion for permissive intervention under rule 24(b) to set aside the stay ordered in Slip Op. 95-23 for the purpose of

addressing class action issues and seeking appropriate relief thereunder.

27 (56) Deft filed its response to pltf's proposed judgment.

Dec. 1 (57) Pltf filed Opposition to Deft's Unauthorized Filing of a Response to Pltf's Proposed Judgment.

4 (58) Pltf filed opposition and amici curiae concurring opposition to Deft's motion for stay pending appeal.

5 Reassigned to Judge Restani and the stay is continued until further directions of the court.

4 (59) Slip Op. 95-199 [ORDERED] that Deft's motion is GRANTED and it is further ORDERED that execution of the money judgment awarded and the effect of the declaratory and injunctive relief granted are stayed until the later of (1) the expiration of the period for filing a notice of appeal; or (2) the conclusion of any appellate proceeding.

18 (60) TEXACO REFINING & MARKETING INC., ET AL., filed amici curiae's motion for permission to file a brief in opposition to motion of ALLIED

TEXTILE SALES CO., ET AL. and in opposition to motion to lift the say in BAXTER, ET AL., w/ Schedule.

4 (61) Slip Op. 95-197 [JUDGMENT] [ORDERED] that a money judgment is awarded Pltf in the amount of 8,281.87, together with interest and cost as provided by law.

1996

Jan. 5 (62) GENERAL CHEMICAL CORP. ET AL., filed memorandum in support of Pltf's motion for the award of prejudgment and postjudgment interest pursuant to Slip Op. 95-197.

5 (63) MONDIAL INTERNATIONAL CORP. ET AL., filed amicus curiae memorandum in support of Pltf's motion for prejudgment and postjudgment interest.

5 (64) BARNES, RICHARDSON & COLBURN counsel for AMOCO CHEMICAL CO., ET AL., filed amici curiae memorandum of law in support of order granting prejudgment and postjudgment interest on refunds of HMT illegally collected on export shipments.

5 (65) BAKER & MCKINZIE, CROWELL & MORING, DORSEY & WHITNEY,

McKenna & Cuneo and Leboeuf, Lamb Green & Macrae, L.L.P. on behalf of their respective clients filed brief of certain amici curiae concerning interest of refunds of HMT's.

5 (66) Neville, Peterson & Williams counsel for Aris-Isotoner, Inc., et al., filed brief of amici curiae concerning award of interest on judgment.

5 (67) Pltf filed motion for the award of prejudgment and postjudgment interest pursuant to Slip Op. 95-197.

5 (68) Pltf filed supplemental memorandum regarding post judgment interest w/ Schedule.

16 (69) Deft filed motion for EOT until Jan 26/96 to file its response to the motion for an award of interest and supporting briefs of Pltf's and amici.

22 (70) Deft's motion for EOT GRANTED ONLY UNTIL JANUARY 23, 1996 AND SHOULD BE PHYSICALLY FILED IN THE COURT BY 4:00 p.m.

23 (71) Deft's filed opposition to Pltf's motion for an award of pre-judgment and post-judgment interest.

Feb. 1 (72) Deft-USA filed NOTICE OF APPEAL.

7 (73) Slip Op. 96-32 [ORDERED] Interest on HMT payments challenged pursuant to 28 U.S.C. Sec 1581(i) may be awarded pursuant to 28 U.S.C. Sec. 2411. J/Restani

8 ALL PARTIES NOTIFIED.

14 Docketed at the CAFC as Appeal No. 96-1210

Mar. 10 (74) Letter to Judge dated 12-12-95 requesting status conference to address position of amici as to interest.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Docket No. 96-1210

UNITED STATES SHOE CORPORATION, PLAINTIFF

v.

UNITED STATES

DOCKET ENTRIES

1996

Feb. 1	Notice of appeal filed by Defendant in the US CIT.
13	Notice of appeal and certified list, received. COUNSEL FOR THE APPELLANT: Jeanne E. Davidson COUNSEL FOR THE APPELLEE: Brian S. Goldstein
23	Certificate of Interest for the Appellant, filed.
	Certificate of Interest for the Appellee, filed.
14	Notice of appeal and certified list, docketed. Notice sent to the parties.
21	Revised Official Caption sent to parties.

(1) Consent letters regarding Amicus Curiae's filing of brief. (MS-03/06/96) Received: 03/06/96 (EOD 03/06/96) (LP)

(2) Baxter Healthcar - Motion to Appear as amici curiae. (MS-03/13/96) Filed: 03/14/96. On consent. Action on motion (3): Granted. By Clerk. Filed: 03/14/96. (EOD 03/14/96 by LP)

(4) Amici - Consent Motion of Amoco Chenical Company to Appear as Amicus Curiae in support of Plaintiff-Appellee. (MS-03/25/96) Filed: 03/26/96. On consent. Action on motion (5): Granted. By clerk. Filed: 03/26/96. (EOD 03/26/96 by LP)

(5) Appellant - Motion Suspend Proceedings. (MS-04/04/96) Filed: 04/04/96. On consent. Action on Motion (7): Granted. By clerk. Filed: 04/05/96 (EOD 04/05/96 by LP)

(8) Rode & Qualey - Consent Motion to Appear as Amicus Curiae in support of Plaintiff-Appellee. (MS-04/10/96) Filed: 04/12/96. On consent. Action on Motion (9): Granted. By clerk. Filed: 04/12/96. (EOD 04/12/96 by LP)

(10) New Holland N.A. - Motion for Leave to Appear as Amicus Curiae in support of the Appellee. (MS-04/16/96) Filed: 4/16/96. On Consent. Action on Motion (10): Granted. By clerk. Filed: 4/18/96. (EOD 4/18/96 by AV)

(11) Amici - Consent Motion of Aris-Isotoner, Inc. and Other Exporters for Leave to Appear as Amicus Curiae in support of Appellee U.S. Shoe Corp. [NPF] (MS-04/16/96) Filed: 4/23/96. On Consent. Action on Motion (16): Motion granted. By clerk. Filed: 5/09/96. (EOD 5/09/96 by ETW)

(12) Aluminum Co. - Consent Motion to Appear as Amici Curiae in support of Plaintiff-Appellee. (MS-04/25/96) Filed: 4/25/96. On Consent. Action on Motion (13): Granted. By Clerk. Filed: 4/26/96. (EOD 4/26/96 by LP)

(14) EI Du Pont - Consent Motion to Appear as Amicus Curiae in support of Plaintiff-Appellee. (MS-05/07/96) Filed: 5/07/96. On Consent. Action on Motion (15): Granted. ByClerk. Filed: 05/08/96. (EOD 05/08/96 by LP)

(17) Companies - Consent Motion to Appear as Amici Curiae in Support of Plaintiff-Appellee. (HS-05/13/96) On consent. Action on motion (18): Granted. By clerk. Filed: 05/14/96. (EOD 05/14/96 by LP)

(19) Swisher - Consent Motion for Leave to Appear as Amicus Curiae in Support of Partial Reversal of the Decision by the Court of International Trade. (MS-05/08/96) Filed: 05/08/96. On consent. Action on Motion (20): Granted. By

clerk. Filed: 05/14/96. (EOD 05/14/96 by LP)

(21) Allied - Consent Motion to Appear as Amicus Curiae in Support of Plaintiff-Appellee. (MS-05/13/96) Filed: 05/15/96. On consent. Action on Motion (22): Granted. By clerk. Filed: 05/16/96 (EOD 05/16/96 by LP)

(23) Amicus (Aris-Isotoner) Ltr. authorizing clk.'s ofc. to correct its E.O.A. (FS-05/22/96) Received: 05/22/96 (EOD 05/22/96) (AV)

(24) Attorney Arthur K. Purcell's Ltr confirming telephone inquiry regarding the entry of appearance. (Noted by clerk of the court) (FS-05/22/96) Received: 05/23/96 (EOD 05/28/96) (LP)

(25) Movant - Consent Motion to Appear as Amici Curiae in Support of Plaintiff-Appellee. (MS-05/28/96) Filed: 05/29/96. On consent. Action on motion (26): Granted. By clerk. Filed: 05/29/96 (EOD 05/29/96 by LP)

(27) Amicus - Motion for Substitution of Counsel. (MS-06/26/96) Filed: 06/27/96. On consent. Action on motion (28): Granted. By clerk. Filed: 06/27/96. (EOD 06/27/96 by LP)

(29) Amicus - Motion to Withdraw as counsel for Amicus Curiae, The Nutrasweet Company. (MS-07/02/96) Filed: 07/03/96. On consent. Action on

Motion (30): Granted. By clerk. Filed: 07/05/96. (EOD 07/05/96 by LP)

New Holland North America, Inc. [Amicus] - Brief of Amicus Curiae New Holland North America, Inc. in Support of Plaintiff-Appellee United States Shoe Corporation (MS-08/22/96). Filed: 08/22/96. [961739] (EOD 08/22/96 by SPP)

Boise Cascade, et al. [Amici] - Brief for Amici Curiae Boise Cascade, Etonic, Inc., Germain-Webber Lumber Co., International Veneer Co., Mondial International Corp., and the Heil Co. urging Affirmance (MS-08/21/96). Filed: 08/21/96. [961741] (EOD 08/22/96 by SPP)

Allied Textile Sales Company [Amicus] - Brief of Amicus Curiae Allied Textile Sales Company for Affirmance of the Judgment Under Review (MS-08/21/96). Filed: 08/21/96. [961743] (EOD 08/23/96 by SPP)

Texaco Refining and Marketing, Inc. et al. [Amici] - Brief of Amici Curiae Texaco Refining and Marketing, Inc. et al., urging Affirmance of the Decision of the Court of International Trade (MS-08/21/96). Received: 08/22/96. Rejected: 08/23/96. Corrected brief due: 09/06/96. [961744] (EOD 08/23/96 by SPP)

Aris-Isotoner, Inc., et al. [Amici] - Brief on behalf of Amici Curiae Aris-Isotoner, Inc., et al., in support of Affirmance (MS-08/21/96). Filed: 8/21/96. Entry of Appearance Notice issued. [961748] (EOD 08/23/96 by SPP)

U.S. [Appellant] - Brief for Defendant-Appellant the United States (MS-07/10/96). Filed: 07/10/96. [961329] (EOD 07/11/96 by SPP)

(31) Amicus - Motion of Swisher for Leave to Include a Copy of Its Complaint in the Court of International Trade as an Addendum to its amicus brief. (MS-07/10/96). Filed 07/10/96. Reply 1 (32) Filed: 07/19/96. Action on Motion (35): Motion Denied. By Motions Panel. Judge: Lourie. Filed: 08/23/96 by ETW)

(33) Attorney (Irvin A. Mandel) Ltr to Court Regarding this Appeal (Sent to SSA) (MS-07/17/96). Mailed: 07/22/96. 36. Ltr to A. Mandel: U.S. filed first brief on 7/10/96. See FRAP 29 Governing Briefing Schedules. By: Clerk. 08/23/96 (EOD 08/23/96) (ETW)

(34) MTS - Motion for Leave to File Brief as Amicus Curiae. (MS-08/16/96). Filed: 08/19/96. Action on Motion (37): Motion Denied. By Motions Panel. Judge: Lourie. Filed: 08/30/96. (EOD 08/30/96 by ETW)

The National Industrial Transportation League [Amicus] - Brief of Amicus Curiae the National Industrial Transportation League Urging Affirmance of the Decision Below (MS-08/19/96). Received: 08/19/96. Rejected: 08/20/96. Corrected brief due: 09/03/96. [961711] (EOD 08/20/96 by SPP)

Aug. 20 General Chemical Corp., et al. [Amici] - Brief of Amici Curiae on Behalf of General Chemical Corp., et al., in Support of Affirmance (MS-08/20/96). Filed: 08/20/96. Entry of Appearance Notice Issued. [961723] (EOD 08/21/96 by SPP)

22 United States Shoe Corporation [Appellee] - Brief for Plaintiff-Appellee United States Shoe Corporation (MS-08/22/96). Filed: 08/22/96. [961733]. (EOD 08/22/96 by SPP)

Baxter Healthcare Corporation and Nestle U.S.A., Inc. [Amici] - Brief of Amici Curiae Baxter Healthcare Corporation and Nestle U.S.A., Inc. Urging Affirmance (MS-08/21/96). Filed: 08/21/96. [961734] (EOD 08/22/96 by SPP)

Aluminum Company of America et al. [Amici] - Brief of Amici Curiae Aluminum Company of America et al., Brown-Forman Corp., et al., and E.I. Du Pont De Nemours & Co., Urging Affirmance of the Decision of the

USITC (MS-08-22-96). Filed: 08/22/96. Entry of Appearance Notice Issued. [961736] (EOD 08/22/96 by SPP)

Amoco Chemical Company [Amicus] - Brief for Amicus Curiae Amoco Chemical Company Urging Affirmance of Judgment Below (MS-08/22/96). Filed: 08/22/96. [961738] (EOD 08/22/96 by SPP)

The National Industrial Transportation League [Amicus] - Corrected Brief of Amicus Curiae the National Industrial Transportation League Urging Affirmance of the Decision Below (MS-08/26/96). Corrected Brief Received: 08/26/96. Filed: 08-19/96. [961711] (EOD 08/27/96 by SPP)

(30) Swisher International, Inc. [Amicus] - Corrected Brief of Amicus Curiae Swisher International, Inc. for Reversal of the Judgment Under Review (MS-08/30/96). Received: 08/30/96. Rejected: 09/03/96. Corrected brief due: 09/17/96. [961801] (EOD 09/03/96 by SPP)

Texaco Refining and Marketing, Inc. et al. [Amici] - Corrected Brief of Amici Curiae Texaco Refining and Marketing, Inc. et al., Urging Affirmance of the Decision of the Court of International Trade (MS-08/30/96). Corrected brief received: 09/03/96.

Filed: 08/21/96. [961744] (EOD 09/05/96 by SPP)

(38) Appellant - Motion for an Enlargement of Time. (MS-09/06/96) Filed: 09/06/96. On consent. Action on Motion (39): Granted. By clerk. Filed: 09/10/96. (EOD 09/10/96 by LP) The brief is due on 10/01/96.

Swisher International, Inc. [Amicus] - Corrected Brief of Amicus Curiae Swisher International, Inc. for Reversal of the Judgment Under Review (MS-09/16/96). Corrected brief received: 09/16/96. Filed: 07/10/96. [961801] (EOD 09/16/96 by SPP)

(40) Appellant - Motion to File an Extended Reply Brief. (MS-09/24/96) Filed: 09/24/96. Reply 1 (41) Filed: 10/03/96. Action on Motion (42): Motion granted. Copy of this order shall be transmitted to merits panel assigned to hear this case. By motions panel. Judge: Plager. Filed: 10/11/96 (EOD 10/11/96 by ETW)

Oct. 2 Reply brief for appellant (27 pages), received. (MS-10/1) (sp)

US [Appellant] - Joint Appendix (MS-10/08/96). Filed: 10/08/96. [972101] (EOD 10/11/96 by SPP)

US [Appellant] - Reply Brief of Defendant-Appellant the United States (MS-10/01/96). Filed: 10/11/96. [972114] (EOD 10/11/96 by SPP)

(43) Ltr to parties: Any amicus curiae wishing to take part in oral argument should file a corresponding motion for consideration by the merits panel assigned to hear this case. Not served. Mailed: 10/15/96 (EOD 10/15/96) (LP)

(44) Amici - (Swisher) Motion For Leave to Participate in Oral Argument. [NPF] (MS-10/29/96) Filed: 10/29/96. Reply 1 (47) Filed: 11/12/96. Action on Motion (44): Denied. By Merits Panel. Filed: 01/23/97. (EOD 01/23/97 by KSH)

(45) Amici - Motion to Participate in Oral Argument in Support of Appellee (MS-10/30/96) Filed: 10/29/96. Reply 1 (47) Filed: 11/12/96. Action on Motion (45): Denied by Merits Panel. Filed: 01/23/97. (EOD 01/23/97 by KSH)

(46) Amici - Motion for Leave to Participate in Oral Argument. (MS-10/29/96) Filed: 10/30/96. reply 1 (47) Filed: 11/12/96. Action on Motion (46): Denied By Merits Panel. Filed 01/23/97. (EOD 01/23/97 KSH)

(48) Amicus - Consent Motion of Amoco Chemical Co. to Participate in Oral Argument in Support of Appellee. (MS-11/14/96) Filed: 11/14/96. On Consent. Action on Motion (48): Denied By Merits Panel. Filed: 01/23/97. (EOD 01/23/97 by KSH)

(49) Amicus - Motion of New Holland North America, Inc. to Present Oral Argument. (MS-11/08/96) Filed: 11/14/96. Action on Motion (49): Denied By Merits Panel. Filed: 01/23/97. (EOD 01/23/97 by KSH)

(50) Amicus - (Aris-Istoner Inc.) Motion for Leave to Participate in Oral Argument [NPF] (MS-11/14/96) Filed: 11/14/96. Action on Motion (50): Denied By Merits Panel. Filed: 01/23/97. (EOD 01/23/97 by KSH)

1997

Jan. 3 (51) Calendaring Notice Issued. Panel 02 K+ on February 7, 1997.

Feb. 7 Submitted after ORAL ARGUMENT by David M. Cohen and Brian S. Goldstein

(Mayer Smith, Michel Rader and Bryson)

Affirmed. Precedential opinion by: J. Michel. Dissenting Opinion by: J. Mayer. Judgment entered: 06/3/97. Costs against appellant. (EOD 06/03/97 by KSH) (Amici curiae were served with copies of opinion)

(52) Appellee's ltr to Court apprising them of an error in the opinion of the Court. (Sent to panel) (HS-06/05/97) Received: 06/05/97 54. Errata Sheet sent to parties on 06/16/97. Filed: 06/13/97 (EOD 06/16/97) (KSH)

(53) Appellees' Bill of Costs Against Appellant. (MS-06/13/97) Filed: 06/13/97. (EOD 06/13/97 by LRP)

(54) Appellant - Motion to Stay the Mandate. (MS-06/24/97) Filed: 06/24/97. Reply 1 (55) Filed: 07/03/97. Action on Motion (56): Granted. By Merits Panel. Filed: 07/14/97 (EOD 07/14/97 by LP)

Petition for Writ of Certiorari filed 08/29/97, Supreme Court #: 97-372. (EOD 09/25/97 by JW)

UNITED STATES COURT OF
INTERNATIONAL TRADE

Docket No. 94-11-00668

UNITED STATES SHOE CORPORATION, PLAINTIFF

v.

UNITED STATES, DEFENDANT

COMPLAINT

Plaintiff, United States Shoe Corporation, by its attorneys, Siegal, Mandell & Davidson, P.C., for its complaint herein alleges upon information and belief as follows:

This action challenges the harbor maintenance fee ("HMF"), imposed under 26 U.S.C. § 4461, as applied to plaintiff's exports from the United States by sea as being unconstitutional under Article 1, Section 9, Clause 5 (the "export clause") of the United States Constitution which provides that "No Tax or Duty shall be laid on Articles exported from any State."

JURISDICTION

1. This Court possesses exclusive jurisdiction over this action by reason of 28 U.S.C. § 1581(a) or, alternatively, 28 U.S.C. § 1581(i)(1), (2) and (4).

2. The Court possesses jurisdiction by reason of 28 U.S.C. §1581(a) as the protest whose denial gave rise to this civil action was timely filed (see attached

protest denial letter from United States Customs Service), and plaintiff filed a timely summons after denial of said protest.

3. The Court, alternatively, possesses jurisdiction by reason of the express mandate of Congress within 26 U.S.C. § 4462(f) and by reason of 28 U.S.C. § 1581(i)(1), (2) and (4) because this action arises out of a law of the United States providing for the assessment of Customs duties (see paragraphs 4-5 below) and relates to the collection and administration of such Customs duties, as well as relating to tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue and the administration and enforcement of such matters (thus invoking jurisdiction under 28 U.S.C. § 1581(i)(1), (2) and (4)); the summons and complaint in this action were filed (*i.e.*, the action was commenced) within two years after the date that the cause of action accrued in accordance with 28 U.S.C. § 2636(i).

4. With respect to the Court's jurisdiction over this action, plaintiff notes that 26 U.S.C. § 4462(f) provides, in connection with the HMF, that:

(f) Extension of provisions of law applicable to customs duty.—

> (1) In general.—Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty. For purposes of the preceding sentence, any penalty expressed in terms of a relationship to the amount of the duty shall be

treated as not less than the amount which bears a similar relationship to the value of the cargo.

(2) Jurisdiction of courts and agencies.—For purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty.

5. Furthermore, the legislative history to the Act provides that "for purposes of determining the jurisdiction of U.S. courts and agencies, the port user charges are to be treated as customs duties. Thus, the Court of International Trade is to have primary jurisdiction for actions involving the port user charge provisions." H.R. Rep. No. 228, 99th Cong., 2nd Sess. 10 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6715.

6. This Court has recently ruled in *Carnival Cruise Lines Inc., et al. v. United States*, 18 CIT ____, Slip Op. 94-169 (October 21, 1994) that it has jurisdiction pursuant to 28 U.S.C. § 1581(i)(2) to review claims involving the Harbor Maintenance Fee Act. The Court specifically stated in *Carnival Cruise Lines*, Slip Op. 94-169 at 11 (emphasis added):

> Congress intended that such [harbor maintenance] fees be treated as customs duties with all of the attendant administrative, enforcement and judicial processes concerning such duties. 26 U.S.C. §§ 4462(f)(1)-(2). That such processes most often deal with goods and not services is of little moment when applying this Court's jurisdictional provisions to the Harbor Maintenance Revenue Act. *The terms of section 1581(i)(2) embrace this Act.*

STANDING

7. Plaintiff has standing to bring the instant action as it is an exporter of merchandise from the United States and has paid Harbor Maintenance Fees to the United States Customs Service in connection with such exportations (such payments are specifically delineated on the annexed schedule). Plaintiff herein is challenging the legality of the imposition of the harbor maintenance fee on its exportations.

BACKGROUND

8. In 1986, Congress enacted the Water Resources Development Act of 1986 (Pub. L. No. 99-662, 100 Stat. 4082), which provided at Section 1402 of the Act for the imposition of a Harbor Maintenance Tax. Specifically, the Act amended Chapter 36 of the Internal Revenue Code of 1954 (relating to "certain other excise taxes") by inserting a new subchapter pertaining to Harbor Maintenance Tax.

9. The statutory provisions imposing the HMF (26 U.S.C. §§ 4461 and 4462) in their current formulation provide:

§ 4461. Imposition of Tax

(a) General rule.—There is hereby imposed a tax on any port use.

(b) Amount of tax.—The amount of the tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.

(c) Liability and time of imposition of tax.—

(1) Liability.—The tax imposed by subsection (a) shall be paid by—

(A) in the case of cargo entering the United States, the importer,

(B) in the case of cargo to be exported from the United States, the exporter, or

(C) in any other case, the shipper.

(2) Time of Imposition.—Except as provided by regulations, the tax imposed by subsection (a) shall be imposed—

(A) in the case of cargo to be exported from the United States, at the time of loading, and

(B) in any other case, at the time of unloading.

§ 4462. Definitions and special rules

(a) Definitions.—For purposes of this subchapter—

(1) Port use.—The term "port use" means—

(A) the loading of commercial cargo on, or

(B) the unloading of commercial cargo from, a commercial vessel at a port.

* * *

(5) Value.—

(A) In general.—The term "value" means, except as provided in regulations, the value of any commercial cargo as determined by standard commercial documentation.

10. With respect to the payment of HMF in connection with exportations from the United States, 19 C.F.R. § 24.24(e)(2)(ii) and (f) provide:

(ii) *Fee payment.* The exporter whose name appears on the SED or equivalent documentation shall pay the accumulated fees on a quarterly basis in accordance with paragraph (f) of this section by mailing a check or money order payable to the U.S. Customs Service for all fees for which he is liable for the quarter to U.S. Customs Service, P.O. Box 70915, Chicago, Illinois 60673-0915...

* * *

(f) *Quarterly payments.* All quarterly payments required by this section must be received no later than 31 days after the close of the quarter being paid. Quarterly periods end on the last day of March, June, September, and December.

11. HMF payments made in connection with exports from the United States are made on a quarterly basis. Quarterly payments are due no later than 31 days after the close of the quarter being paid, and such payments have been made by plaintiff.

12. The HMF is assessed on the value of commercial cargo loaded or unloaded from a commercial vessel. The HMF is an *ad valorem* fee, currently at 0.125 percent of the value of the cargo (prior to January 1, 1991, HMF was assessed at 0.04 percent of this value). The HMF is assessed on cargo imports, exports, domestic movements, admissions into foreign trade zones, and on arriving passengers aboard commercial vessels.

13. The statutory provision requiring the payment of HMF specifically provides that the amount of the tax imposed will be equal to a specific percentage of the value of the commercial cargo involved.

14. 19 C.F.R. § 24.24(e)(2)(i) specifically provides that, in the instance of exportations, the fee is based upon the value of the shipment loaded as required to be indicated on the Shipper's Export Declaration ("SED") or equivalent documentation. Accordingly, the determination of the fee to be paid is directly related to the information set forth on the SED, the document required in most instances for exportation from the United States. In the instance of cargo exported from the United States, it is specifically the exporter who is liable for payment of the HMF.

15. It is evident from the plain language of the HMF statute that it is a "tax." It is specifically listed as an "excise tax" within the Internal Revenue Code. 26 U.S.C. § 4461. In the instant context, the HMF is also considered to be a Customs "duty" (as discussed above at paragraphs 4-5).

16. The HMF is a tax or duty on articles exported from the United States. It is the value of the commercial cargo to be exported which determines the amount of tax or duty to be paid, and thus the HMF is directly connected to the export of merchandise. No tax or duty will be imposed without the act of loading cargo on to a vessel for exportation. HMF calculation and the amount due are inextricably tied to the export process and documentation; without the act of exporting and necessary documentation, the amount of HMF owing could not be determined.

CAUSE OF ACTION

17. Paragraphs 1 through 16 are repeated with the same force and effect as if fully stated herein.

18. The HMF is a tax or duty on exports which must be invalidated by the export clause of the Constitution which prohibits any tax or duty on exports from the United States.

19. The prohibition contained in the export clause refers to the imposition of taxes or duties on goods by reason of or because of their exportation, or intended exportation, or while they are being exported, (*i.e.*, they are in the course of transportation). The tax or duty immunity runs to the process of exportation and the transactions and documents embraced in it.

20. The HMF is in substance and effect equivalent to a tax or duty on the articles exported, and thus prohibited by the export clause. The HMF as applied to exports from the United States is clearly embraced within the constitutional prohibitions of the export clause.

21. The export process begins at the time of loading cargo. In the case of HMF, the tax is specifically imposed at the time of loading cargo.

22. The HMF amount due is inextricably tied to the export process and its necessary documentation, as the "value" for purposes of determining the HMF due is the value of the cargo as determined by standard commercial documents. It is the exporter of the subject merchandise who is liable for the fee rather than any other party (*e.g.*, a vessel operator); specifically, it is the party named on the SED or similar documentation that is liable.

23. In sum, the HMF, as applied to plaintiff's exports from the United States by sea, is unconstitutional under Article 1, Section 9, Clause 5 of the Constitution which provides that "No Tax or Duty shall be laid on Articles exported from any State."

24. Plaintiff has paid harbor maintenance fees which are not required by law, in that they relate to export cargo. Plaintiff has calculated that for the period April 1, 1994 through June 30, 1994 it paid harbor maintenance fees (in connection with export cargo) in the total amount of $8,281.87; the attached schedule specifically delineates plaintiff's payments. This total amount should be refunded in full together with appropriate interest to plaintiff.

REQUEST FOR JUDGMENT AND RELIEF

WHEREFORE, plaintiff respectfully requests that this Court enter a judgment and order against the defendant declaring that the Harbor Maintenance Fee as assessed against plaintiff's exports is unconstitutional and that all HMF payments made by plaintiff, as delineated on the annexed schedule, be refunded with appropriate interest, costs and attorney's fees, and for such other and further relief as this Court may deem just and proper.

Respectfully submitted,

SIEGEL, MANDELL & DAVIDSON, P.C.
Attorneys for Plaintiff
One Astor Plaza
1515 Broadway
New York, New York 10036
Tel.: (212) 944-7900

By:
/s/ BRIAN S. GOLDSTEIN
BRIAN S. GOLDSTEIN, Esq.

By:
/s/ LAURENCE M. FRIEDMAN
LAURENCE M. FRIEDMAN, Esq.

[Seal omitted]

DEPARTMENT OF THE TREASURY
U.S. CUSTOMS SERVICE
INDIANAPOLIS, INDIANA

[Oct. 25, 1994]

PRO 2-06:OF:N:RA:FS JD

Siegel, Mandell & Davidson, P.C.
1515 Broadway, 43rd Floor
New York, New York 10036

Dear Sir/Madam:

The U. S. Customs Service has received, and has assigned protest number 992094100245 to the protest filed on behalf of United States Shoe Corporation, which claims that the Harbor Maintenance Fee on exports is unconstitutional.

This protest is denied in full because:

1. ___ It is incomplete.

2. ___ It was untimely filed.

3. _x_ The Harbor Maintenance Fee is not an unconstitutional tax on articles exported from any state, but, rather, the tax is a statutorily mandated fee assessment levied on Port users in order to maintain and preserve United States Ports and Waterways. (2nd Quarter(s) 1994)

Please be advised that you may file a civil action contesting the denial of this protest under 19 U.S.C. 1514 in the Court of International Trade.

Sincerely,

/s/ JOHN V. [illegible]
JOHN V. [illegible]
for Thomas E. Diaforli
Director, National Finance
Center

UNITED STATES SHOE CORPORATION

SCHEDULE OF HARBOR MAINTENANCE FEE PAYMENTS

QUARTER END	HMF PAID	CHECK NUMBER	CHECK DATE
6/30/94	$8,281.87	007344	7/19/94

[Feb. 16, 1993]

FIRST ANNUAL REPORT TO CONGRESS
ON THE
STATUS OF THE HARBOR MAINTENANCE
TRUST FUND
FISCAL YEARS 1987 - 1992

BACKGROUND

1. Introduction. This report is being provided in compliance with Section 330 of the Water Resources Development Act of 1992, Public Law 102-580. Since this is the first annual report to Congress on the status of the Harbor Maintenance Fee and Trust Fund, more detail is provided on the background of the fee, how projects "eligible" for cost recovery were identified, and how "eligible operations and maintenance costs" were defined. This initial report will cover the history of the Harbor Maintenance Fee and Trust Fund since its inception in 1986 through Fiscal Year (FY) 1992. Future reports will address only the fiscal year being reported.

2. Authorization of Fee. The Harbor Maintenance Fee was authorized under Sections 1401 and 1402 of the Water Resources Development Act of 1986. Public Law 99-662. This law imposed a 0.04 percent fee on the value of commercial cargo loaded (exports and domestic cargo) or unloaded (imports) at ports which have had Federal expenditures made on their

behalf since 1977 for construction, operation, or maintenance. The effective date of this fee was April 1, 1987. A copy of this law may be found at Appendix A. Federal expenditures for these purposes were determined to be synonymous with expenditures made by the Army Corps of Engineers. The Harbor Maintenance Fee and Trust Fund are administered by the Department of Treasury, in particular the U. S. Customs Service, in cooperation with the Army Corps of Engineers.

3. Initial Level of Recovery. The intention of Section 210 of Public Law 99-662 was to recover 100 percent of the eligible operations and maintenance (O&M) costs of the United States portion of the Saint Lawrence Seaway and up to 40 percent of the Army Corps of Engineers O&M expenditures made on behalf of commercial users of U.S. channels and harbors. The 0.04 percent *ad valorem* rate was based on estimated levels of recovery, at the time of implementation, of approximately $160 million per year. Collections during the first three full years of implementation at the 0.04 percent rate, FY 1988 through FY 1990, averaged $160.3 million.

4. Current Level of Recovery. Section 11214 of the Omnibus Budget Reconciliation Act of 1990, Public Law 101-580, increased the Harbor Maintenance Fee to 0.125 percent, and this increase went into effect on January 1, 1991. Section 316 of the Water Resources Development Act of 1990, Public Law 101-640, authorized recovery of up to 100 percent of the Corps eligible O&M expenditures. Collections at the new rate of 0.125 percent were projected to be $580 million for FY 1992. Although actual 1992 collections were about $46 million less than anticipated, they were sufficient to

reimburse the Corps for 100 percent of its FY 1991 expenditures made on behalf of commercial navigation, because actual expenditures also were less than that anticipated at the time the 0.125 percent rate was established. It is timely to mention that the 0.125 percent *ad valorem* fee also includes a provision to reimburse the National Oceanic and Atmospheric Administration (NOAA) on an annual basis approximately $45 5 million (an amount equivalent to a 0 01 percent *ad valorem* fee) for its activities pertaining to commercial navigation. Whereas collections occurred, the authority to withdraw these funds from the Harbor Maintenance Trust Fund has never been obtained by NOAA and this revenue has been accumulating in the Trust Fund since January 1, 1991.

COSTS ELIGIBLE FOR RECOVERY

5. Defining Expenditures Eligible for Recovery. Section 210 of Public Law 99-662 authorizes appropriations out of the Harbor Maintenance Trust Fund for 100 percent of the "eligible operations and maintenance costs of those portions of the Saint Lawrence Seaway operated and maintained by the Saint Lawrence Seaway Development Corporation" and "not more than 40 percent" (later changed to 100 percent) "of the eligible operations and maintenance costs assigned to commercial navigation of all harbors and inland harbors within the United States." The following paragraphs described how those costs are defined and accounted for within the context of Section 210.

6. Army Corps of Engineers Projects Eligible for Cost Recovery. Section 210 of Public Law 99-662 refers to the payment of such sums as may be necessary to pay for "eligible operations and maintenance costs assigned to commercial navigation of all harbors and inland harbors within the United States." The term "commercial navigation" referenced in Section 210 was determined to mean any project authorized by Congress with "commercial navigation" as an authorized purpose. Operations and maintenance costs for these projects are accounted by the Corps of Engineers Management Information System (COEMIS). A complete list of these projects may be found at Appendix B, along with the February 13, 1987, transmittal letter from the Assistant Secretary of the Army (Civil Works) to the Assistant Commissioner, Office of Commercial Operations of the U.S. Customs Service, Department of the Treasury. Many of these projects date back to the early 1900's and no longer are maintained. Nevertheless, 971 "commercial navigation" projects were identified, these were further stratified as shown below:

Army Corps of Engineers
Civil Works Projects with Navigation as an Authorized Purpose
FY 1977 through FY 1988

Zero-cost Projects (since FY 1977)	179
Deep Draft Operations and Maintenance Projects	297
Inland Waterways Projects Subject to Fuel Tax	97
Shallow Draft Projects not Subject to Fuel Tax	378
Additional Deep Draft Construction Projects	12
Additional Shallow Draft Construction Projects	8
Total	971

Zero-cost projects, or those which have had no operations and maintenance expenditures since FY 1977, were exempt under Public Law 99-662. Since this law also exempted any cargo having been transported on a fuel taxed waterway (defined in Section 206 of Public Law 95-502), these costs also were excluded from the universe of projects subject to recovery. Any remaining projects were considered to be subject to cost recovery under the law.

7. Army Corps of Engineers Expenditures Eligible for Recovery. Many projects with "commercial navigation" as a project purpose have other authorized purposes as well. Such purposes include recreation, hydropower, flood control, water supply, and the like. Typically, deep draft port projects are single purpose (commercial navigation) projects, although a few also are authorized for recreation. All O&M expenditures made on behalf of single purpose commercial navigation projects were considered subject to recovery. Joint-use costs were allocated to the project's various purposes in proportion to the benefits realized for each purpose. Appendix C displays annual O&M expenditures eligible for reimbursement from the Harbor Maintenance Trust Fund since FY 1987. Appendix C differentiates deep draft projects (greater than 14 feet) from shallow draft projects (14 feet and less). These are identified by state, by port, and by project where the project name differs from that of the port or where a port may consist of more than one project. These expenditures, as shown in Appendix C, were calculated after the close of the fiscal year and after careful review for accuracy. Because such a thorough review cannot be completed until several months after the close of the fiscal year,

the actual transfer of funds from the Harbor Maintenance Trust Fund is for expenditures made in the previous fiscal year. In other words, FY 1990 expenditures are shown as transfers from the Harbor Maintenance Trust Fund in FY 1991, and so forth. Corps expenditures are never made directly from the Trust Fund, nor are transfers made on the basis of estimates or projections.

8. Other Expenditures Eligible for Cost Recovery. The Army Corps of Engineers is by far the largest user of the Harbor Maintenance Trust Fund. The operations and maintenance costs of the St. Lawrence Seaway average between $9-13 million per year. Seaway tolls for that portion under United States jurisdiction are deposited into the Harbor Maintenance Trust Fund and later rebated to vessel operating companies applying for said rebates. The Department of Treasury withdraws about $200,000 per year for administering the Trust Fund. Harbor Maintenance Fee revenues and Trust Fund withdrawals will be discussed in the following sections of this report.

HARBOR MAINTENANCE FEE REVENUES

9. Collections and Receipts. All commerce subject to the Harbor Maintenance Fee (imports, exports, and domestic) incurs the same 0.125 percent *ad valorem* fee. The principal source of revenue paid into the Harbor Maintenance Trust Fund comes from imports. This is because imports tend to consist of high value commodities (e.g., electronics, automobiles, petroleum, metal products, etc.) while U. S. exports and domestic cargo generally are lower value cargo (e.g.,

grain, coal, paper, and wood products). The following table shows revenue paid into the Harbor Maintenance Trust Fund since its inception. The fee revenue reported below is obtained from the U. S. Customs Service, and it represents actual collections through the last day of each fiscal year. (Total revenue shown in this table may differ from that shown in the Budget of the United States, since budgetary data must rely on revenue estimates prepared weeks or months before the close of the fiscal year.) Only the U. S. Customs Service reports revenue by source—critical information for monitoring receipts and estimating compliance. As of the close of FY 1992, the U. S. Customs Service shows Harbor Maintenance Fee collections (from FY 1987 through FY 1992) to be some $26,592,000 greater than reported by the Department of Treasury's Financial Management Services. It is anticipated that an adjustment for this difference will be made in FY 1993 by the Department of Treasury.

Harbor Maintenance Fee and Trust Fund
Revenue by Source
FY 1987 through FY 1992
(thousands of dollars)

	FY 1987	FY 1988	FY 1989
Tax on Imports	$43,249	$99,793	$105,927
Tax on Exports	6,777	35,938	44,618
Tax on Foreign Trade Zones	677	3,102	3,875
Tax on Domestics	2,414	9,170	8,590
Tax on Passengers	120	551	666
NET COLLECTIONS	$53,237	$148,554	$163,677

	FY 1990	FY 1991	FY 1992
Tax on Imports	$109,215	$258,321	$342,402
Tax on Exports	45,808	93,194	142,916
Tax on Foreign Trade Zones	4,020	9,166	16,974
Tax on Domestics	9,069	19,518	28,451
Tax on Passengers	559	1,977	3,275
NET COLLECTIONS	$168,671	$382,176	$534,018

Source. Office of Inspection and Control, U. S. Customs Service, Department of Treasury

10. Enforcement, Collections, and Shortfalls. Of all of the revenue sources above, imports are probably the most reliable and accurate. This is because the Harbor Maintenance Fee on imports is collected in conjunction with the U. S. Customs fee. The mechanism for administrating, collecting, and enforcing customs fees is well established and well enforced. Although Shipper Export Declarations routinely are reported to the Department of Commerce, the penalties associated with the non-reporting or under-reporting of export values was of minimal consequence prior to the implementation of the Harbor Maintenance Fee. Domestic shippers have had even less experience. Although domestic vessel operators routinely report tonnage movements to the Army Corps of Engineers Waterborne Commerce Statistical Center, value of cargo has never been reported, and the data have been used for statistical purposes only. Reporting is good, but essentially voluntary. Based on the type and volume of commerce compared

with revenue paid by these two sectors, there appears to be significant shortfalls from domestic shippers and, to a lesser extent, from exporters. This is further supported by the level of increases in revenue from these sources between FY 1991 and FY 1992. While remembering that the *ad valorem* fee increased from 0.04 percent to 0.125 percent on January 1, 1991, revenue for imports increased some 32 percent, while revenue from exports increased 53 percent and revenue from domestic shippers increased 45 percent. Whereas the disproportional increases in these two sectors compared to imports is encouraging, there still appears to be shortfalls. Many factors can affect these revenue totals. Trends in tonnage growth (decline) and even changes in the value of the dollar can contribute to variations in revenue by source. Actual FY 1992 collections of $534 million were some $46 million (or about 8.6 percent) less than projected. It is believed that further improvements in export and domestic collections can be realized with better administration and enforcement.

11. Funding for Administrative Costs. Section 1403 of Public Law 99-662 created the Harbor Maintenance Trust Fund (by amending subchapter A of Chapter 98 of the Internal Revenue Code of 1954). This section also authorized the Department of Treasury to obtain, annually, up to $5 million to administer the Harbor Maintenance Fee and Trust Fund. This money was to be appropriated from the Merchandise Processing Fee authorized under the Consolidated Omnibus Budget Reconciliation Act of 1985. The use of funds from this source for administrating the Harbor Maintenance Fee, however, was found in violation of the General Agreement on Tariff

and Trade (GATT) in 1987. Since that date, no funds have been available for administering the Harbor Maintenance Fee and Trust Fund. Several attempts have been made to introduce legislation which would allow the $5 million to be appropriated from the Harbor Maintenance Trust Fund; however, none has succeeded. Without resources to properly administer the Harbor Maintenance Fee and Trust Fund, shortfalls as described above are expected to continue.

HARBOR MAINTENANCE TRUST FUND

12. Transfers From the Harbor Maintenance Trust Fund. Transfers from the Harbor Maintenance Trust Fund to the Department of Transportation's Saint Lawrence Seaway Development Corporation and to the Army Corps of Engineers are shown in the following table. Details concerning the expenditures of the Army Corps of Engineers may be found in Appendix C.

Appropriations from
Harbor Maintenance Trust Fund
FY 1987 through FY 1992
(thousands of dollars)

	FY 1987	FY 1988	FY 1989
Corps of Engineers	$35,000.0	$148,000.0	$159,026.0
St. Lawrence Seaway	4,000.0	9,424.0	10,382.0
SLS Toll Rebates	3,997.8	8,894.5	10,977.3
Dept. of Transportation*	0.0	0.0	0.0
Administration Costs	0.0	142.1	167.3
NET APPROPRIATIONS	$42,997.8	$166,460.7	$180,552.7

	FY 1990	FY 1991	FY 1992
Corps of Engineers	$159,073.7	$333,401.5	$462,229.2
St. Lawrence Seaway	11,397.0	9,075.0	10,949.9
SLS Toll Rebates	9,041.5	10,297.8	9,579.0
Dept. of Transportation*	0.0	0.0	16.0
Administration Costs	168.6	186.3	170.0
	$179,680.8	$352,960.5	$482,944.1

Source. Funds Accounting Branch, Financial Management Services, Department of Treasury

* Payment of rent for the St. Lawrence Seaway Development Corporation as authorized by Title 1, Public Law 102-143.

13. Status and Balances in the Harbor Maintenance Trust Fund. The following table summarizes the revenues received into the Harbor Maintenance Trust Fund, and appropriations from the Trust Fund, since its inception in FY 1987. The table is prepared from data provided by the Funds Accounting Branch, Financial Management Services, of the Department of Treasury. Revenues shown in this table may not agree with actual collections reported by the U.S. Customs Service. However, the Financial Management Services, Department of Treasury, is the official source of Trust Fund balances and expenditures and is the only source of obtaining interest income and disbursements attributed to the Harbor Maintenance Trust Fund.

Harbor Maintenance Trust Fund
Revenues and Expenditures
FY 1987 through FY 1992
(thousands of dollars)

	FY 1987	FY 1988	FY 1989
Beginning Balance	$0.0	$15,198.9	$9,714.9
Revenues:			
Harbor Maintenance Fee	53,000.0	144,001.0	166,000.0
Toll Receipts	4,643.0	10,447.5	9,806.4
Interest	553.7	6,528.2	7,342.8
Net Available:	58,196.7	160,976.7	183,149.2

	FY 1990	FY 1991	FY 1992
Beginning Balance	$12,311.5	$30,253.6	$72,793.9
Revenues:			
Harbor Maintenance Fee	180,493.0	374,420.0	505,827.0
Toll Receipts	8,849.3	9,266.6	8,733.0
Interest	8,280.6	11,814.3	16,519.9
Net Available	197,622.9	395,500.9	531,079.9

	FY 1987	FY 1988	FY 1989
Expenditures:			
Corps of Engineers	35,000.0	148,000.0	159,026.0
St. Lawrence Seaway	4,000.0	9,424.0	10,382.0
SLS Toll Rebates	3,997.8	8,894.5	10,977.3

	FY 1990	FY 1991	FY 1992
	159,073.7	333,401.5	462,229.2
	11,397.0	9,075.0	10,949.9
	9,041.5	10,297.8	9,579.0
Dept. of Transportation	0.0	0.0	0.0
Administration Costs	0.0	142.1	167.3
Net Expenditures:	42,997.8	166,460.7	180,552.6

	FY 1987	FY 1988	FY 1989
	0.0	0.0	16.0
	168.6	186.3	170.0
	179,680.8	352,960.6	482,944.1
Ending Balance:	$15,198.9	$9,714.9	$12,311.5
	FY 1990	FY 1991	FY 1992
	$30,253.6	$72,793.9	$120,929.7

Source. Funds Accounting Branch, Financial Management Services, Department of Treasury

* Payment of rent for the St. Lawrence Seaway Development Corporation as authorized by Title 1, Public Law 102-143.

14. Challenge by European Community (EC) Members of the General Agreement on Tariff and Trade (GATT). It is worth noting that on March 20, 1992, the Office of the Assistant Secretary of the Army (Civil Works) received a letter from the Office of the United States Trade Representative in Geneva, Switzerland, stating that the EC members of GATT had requested a formal "consultation" concerning the appropriateness of the Harbor Maintenance Fee within the context of GATT. Issues included the *ad valorem* nature of the fee, the nature of the expenditures made on behalf of commercial navigation, and verification that the domestic sector of the U. S. economy also was paying the fee. Of special concern was the growing surplus of the Harbor Maintenance Trust Fund. The Assistant Secretary

of the Army (Civil Works) sent a representative to Geneva who, with a legal advisor from the Office of the U. S. Trade Representative, addressed these issues with the EC members of GATT. Additional consultations have not been requested to date. It was clear, however, that the European Community has been monitoring carefully the Harbor Maintenance Fee and Trust Fund and is ready to file a formal complaint if the administration of the Trust Fund should deviate outside the parameters of the General Agreement on Tariff and Trade.

15. Harbor Maintenance Trust Fund Balances. The balance remaining in the Harbor Maintenance Trust Fund as of September 30, 1992, was $120,929,792.23. This "surplus" continues to be of concern and is primarily the result of the inability to obtain authorizing legislation to allow the National Oceanic and Atmospheric Administration to receive approximately $45.5 million per year from the Trust Fund. Also of concern is the absence of legislative authority to withdraw $5 million per year from the Trust Fund for the administrative expenses of U. S. Customs Service, Census Bureau, and the Army Corps of Engineers. This $50.5 million is included in the current 0.125 percent fee rate. Had these monies been withdrawn in 1991 and in 1992, the surplus in the Trust Fund would be less than $20 million.

16. Harbor Maintenance Trust Fund Projections. The following table displays anticipated deposits, withdrawals, and Trust Fund balances through FY 1997. The projections assume that legislation to withdraw annually from the Harbor Maintenance Trust Fund the $5 million for administering the Fee and Trust Fund, and approximately $45.5 million for

NOAA will be approved for implementation on October 1, 1994. If this does not occur, annual Trust Fund receipts are likely to be $15-70 million less than projected and withdrawals approximately $45.5 million less. If the NOAA legislation is not approved, and these monies remain in the Harbor Maintenance Trust Fund, the ending balance surplus will grow to what may be considered unacceptable levels. Whereas a surplus of $100-200 million should be recognized as a prudent reserve for contingencies, amounts in excess of this are likely to be challenged by the European Community members of GATT.

Harbor Maintenance Trust Fund
Projected Revenues and Expenditures
FY 1992 through FY 1997
(thousands of dollars)

	FY 1992*	FY 1993*	FY 1994
Beginning Balance	$72,793.9	$120,929.7	$188,751
Revenues:			
Harbor Maintenance Fee	505,827.0	554,000	570,620
Toll Receipts	8,733.0	10,200	10,500
Interest	16,519.9	18,308	22,913
Net Available	531,079.9	582,508	604,033

	FY 1995	FY 1996	FY 1997
Beginning Balance	$220,037	$260,783	$305,874
Harbor Maintenance Fee	599,151	623,117	635,579
Toll Receipts	10,600	10,700	10,800
Interest	25,358	28,278	31,228
Net Available:	635,109	662,095	677,607

	FY 1992*	FY 1993*	FY 1994
Expenditures:			
Corps of Engineers	462,229.2	493,452	500,000
St. Lawrence Seaway	10,949.9	10,825	11,355
SLS Toll Rebates	9,579.0	10,250	10,727
Dept. of Transportation	16.0	160	165

	FY 1995	FY 1996	FY 1997
Corps of Engineers	521,000	543,000	564,000
St. Lawrence Seaway	11,853	12,383	12,938
SLS Toll Rebates	10,840	10,946	11,057
Dept. of Transportation	170	175	175

	FY 1992*	FY 1993*	FY 1994
Admin. Costs (Proposed Legislation)	170.0	0	5,000
NOAA (Proposed Legislation)	0.0	0	45,500
Net Expenditures:	482,944.1	514,687	572,747
Ending Balance:	$120,929.7	$188,751	$220,037

	FY 1995	FY 1996	FY 1997
Admin. Costs (Proposed Legislation)	5,000	5,000	5,000
NOAA (Proposed Legislation)	45,500	45,500	45,500
Net Expenditures:	594,363	617,004	638,670
Ending Balance:	$260,783	$305,874	$344,811

* FY 1992 figures are actual revenues and appropriations as reported by Department of Treasury.

** FY 1993 Harbor Maintenance Fee revenue includes reconciliation of $28.2 million for underestimating of revenue in 1992.

17. Conclusions. The Harbor Maintenance Trust Fund is meeting its objective of financing 100 percent of the eligible operations and maintenance expenditures made on behalf of commercial navigation for the St. Lawrence Seaway Development Corporation and the Army Corps of Engineers. The collections and Trust Fund

balances are well within expected parameters established at the time of enactment. There is evidence that improvements in collections can be made, particularly in the domestic sector and, to a lesser extent, from exporters. The Department of Treasury, and in particular the U. S. Customs Service, has done an excellent job of collecting and administering the program under the current funding limitations. Full funding of the $5 million is needed, however, for appropriate administra tion and equitable enforcement of this important program.

SECOND ANNUAL REPORT TO CONGRESS

ON THE

STATUS OF THE HARBOR MAINTENANCE TRUST FUND

FOR

FISCAL YEAR 1993

SECOND ANNUAL REPORT TO CONGRESS ON THE STATUS OF THE HARBOR MAINTENANCE TRUST FUND FOR FISCAL YEAR 1993

BACKGROUND

1. Introduction. This report is being provided in compliance with Section 330 of the Water Resources Development Act of 1992, Public Law 102-580. This is the Second Annual Report to Congress on the status of the Harbor Maintenance Fee (HMF) and Trust Fund (HMTF). For more background information on the HMF, please refer to the First Annual Report to Congress. That initial report also covered the history of the Harbor Maintenance Fee and Trust Fund since its inception in 1986 through Fiscal Year (FY) 1992.

2. Current Level of Recovery. Section 11214 of the Omnibus Budget Reconciliation Act of 1990, Public Law 101-580, increased the Harbor Maintenance Fee to 0.125 percent. This increase went into effect on January 1, 1991. Section 316 of the Water Resources Development Act of 1990, Public Law 101-640, authorized recovery of up to 100 percent of the Army Corps of Engineers eligible Operation and Maintenance (O&M) expenditures made on behalf of commercial navigation. The 0.125 percent *ad valorem* fee also was calculated to be sufficient to reimburse the National Oceanic and Atmospheric Administration (NOAA) on an annual basis approximately $45.5 million (an amount approximating a 0.01 percent *ad*

valorem fee) for its activities pertaining to commercial navigation. Whereas collections have been very near projections, withdrawals have been less than anticipated. The authority to withdraw funds from the HMTF has never been obtained by NOAA, and this revenue has been accumulating in the Trust Fund since January 1, 1991. Additionally, the budget authority of the Corps of Engineers has been much less than anticipated when the 0.125 percent *ad valorem* fee was established. Deposits into the HMTF during FY 1993 totaled $650,722,238.53, of which $13,520,788.24 was interest. Total transfers from the HMTF equaled $468,106,523.56 during FY 1993. This has caused an FY 1993 surplus of $182,615,714.97 and has resulted in an accumulated HMTF surplus of $303,545,507.20 at the beginning of FY 1994. Both revenue and expenditures will be discussed in more detail later in this report.

COSTS ELIGIBLE FOR RECOVERY

3. Defining Expenditures Eligible for Recovery. Section 210 of Public Law 99-662 authorizes appropriations out of the Harbor Maintenance Trust Fund for 100 percent of the "eligible operations and maintenance costs of those portions of the St. Lawrence Seaway operated and maintained by the St. Lawrence Seaway Development Corporation" and "not more than 40 percent" (amended under Section 316 of Public Law 101-640, the Water Resources Development Act of 1990, to 100 percent) "of the eligible operations and maintenance costs assigned to commercial navigation of all harbors and inland harbors within the United States." Section 210 of Public Law 99-662 refers to the payment of such sums as may be

necessary to pay for "eligible operations and maintenance costs assigned to commercial navigation of all harbors and inland harbors with the United States." The Corps of Engineers interprets the term "commercial navigation" referenced in Section 210 to mean any project authorized by Congress with "commercial navigation" as an authorized purpose. O&M costs for these projects are accounted by the Corps of Engineers Management Information System (COEMIS). Transfers for current fiscal year expenditures are based on the actual expenditures of the previous fiscal year; that is, FY 1993 withdrawal is equal to FY 1992 actual expenditures.

4. Army Corps of Engineers Expenditures Eligible for Recovery. Many projects with "commercial navigation" as a project purpose have other authorized purposes as well. Such purposes include recreation, hydropower, flood control, water supply, and the like. Typically, deep draft port projects are single purpose (commercial navigation) projects, although a few also are authorized for recreation. All O&M expenditures made on behalf of single-purpose commercial navigation projects were considered subject to recovery. Joint-use costs were allocated to the project's various purposes in proportion to the benefits realized for each purpose. Appendix A displays annual O&M expenditures eligible for reimbursement from the Harbor Maintenance Trust Fund during FY 1993. Appendix A includes two tables which differentiate between deep draft projects (greater than 14 feet) and shallow draft projects (14 feet and less). These are identified by State and by project name. The Army Corps of Engineers transfers during FY 1993, which represent

actual expenditures made during FY 1992 by the Corps, were $446,164,200.

5. Other Expenditures Eligible for HMTF Funding. One hundred percent of the O&M expenditures for the St. Lawrence also are taken from the Harbor Maintenance Trust Fund. During FY 1993, $13,744,000 was transferred to the St. Lawrence Seaway for its use in FY 1993, including $160,000 for St. Lawrence Seaway rent payments transferred to the Department of Transportation. In addition, Seaway tolls for that portion under United States jurisdiction are deposited into the Harbor Maintenance Trust Fund but then rebated fully to vessel operating companies that paid the tolls. During FY 1993, $8,074,344 in Seaway tolls were returned to vessel operating companies. The Department of the Treasury also withdrew $124,000 to cover its cost for administering the Trust Fund.

HARBOR MAINTENANCE FEE REVENUES

6. Collections and Receipts. All commerce subject to the Harbor Maintenance Fee (imports, exports, and domestic) incurs the same 0.125 percent *ad valorem* fee. Imports lead as a source of revenue paid into the Harbor Maintenance Trust Fund, since they lead in the total volume and value of cargo subject to the fee. Generally, imports tend to consist of higher value commodities (e.g., electronics, automobiles, etc.), while U.S. exports and domestic cargo generally are lower value cargo (e.g., grain, coal, paper, etc.). The following table shows revenue paid into the Harbor Maintenance Trust Fund since FY 1988, the first full

year of implementation, based on actual collections through the last day of each fiscal year.

Harbor Maintenance Fee
Collections by Source
FY 1988 through FY 1993
(thousands of dollars)

	FY 1988	FY 1989	FY 1990
Imports	$99,793	$105,927	$109,215
Exports	35,938	44,618	45,808
Foreign Trade Zones	3,102	3,876	4,020
Domestics	9,170	8,590	9,069
Passenger	551	666	559
Net Collections:	$148,554	$163,677	$168,671

	FY 1991	FY 1992	FY 1993
Imports	$258,321	$342,402	$361,678
Exports	93,194	142,916	169,141
Foreign Trade Zones	9,166	16,974	20,959
Domestics	19,518	28,451	31,858
Passenger	1,977	3,275	4,748
Net Collections:	$382,176	$534,018	$588,384

Source: Office of Inspection and Control, U.S. Customs Service, Department of the Treasury
Note: HMF collections in any given year differ from revenues officially deposited into the HMTF due to reporting time and estimating error.

Total revenue collections shown in this table differ from the "official" HMTF deposits shown in paragraph 10 of this report because the Treasury Income Statement of the HMTF, like the Budget of the United States, must rely on revenue estimates prepared weeks or months before the close of the fiscal year. The Department of the Treasury reconciles differences between actual fee receipts as reported by the U.S. Customs Service and its estimates on a monthly basis, as well as at the beginning of each fiscal year. Only the U.S. Customs Service reports actual revenue by source. This information is used to monitor receipts on a regular basis and to estimate compliance.

7. Enforcement, Collections, and Shortfalls. The Harbor Maintenance Fee on imports is collected in conjunction with the U. S. customs fee. The mechanism for administrating, collecting, and enforcing customs fees is well established and well enforced. Shipper Export Declarations (SED's) are routinely reported to the Department of Commerce. The export values reported on the SED's were important only for statistical purposes prior to the implementation of the HMF. Now that Congress has authorized the $5 million per year for administering the HMF, it should be possible to develop a procedure for better ensuring the accuracy of the fees paid on exports. Domestic shippers have had even less experience. Domestic vessel operators routinely report tonnage movements to the Army Corps of Engineers Waterborne Commerce Statistical Center; however, the value of this cargo is not available to the vessel operating companies, and the tonnage data have been used for statistical purposes only. Reporting is good, but essentially

voluntary. Based on the type and volume of commerce, compared with revenue paid, there appears to be significant shortfalls from domestic shippers.

The Bureau of Census value of imports between FY 1992 ($310.3 billion) and FY 1993 ($331.7 billion) increased by 6.8 percent—very close to the 6.4 percent HMF revenue increase from imports plus foreign trade zones. Reported FY 1993 value of exports actually dropped from $185.2 billion in FY 1992 to $176.6 billion in FY 1993, while HMF revenue from exports increased by 18.3 percent. Even though the reporting periods are different (calendar year versus fiscal year), this still implies a significant improvement in compliance. Whereas there are no comparable statistics on value of domestic waterborne commerce, HMF receipts increased by 12.0 percent between FY 1992 and FY 1993—a greater increase than expected. Revenue from passenger vessels, a category which has demonstrated significant resistance to HMF collections, also increased. Even though there is evidence of improvement in compliance, we believe that collections can increase in these categories by about $50 million per year with better administration and enforcement. HMF projections assume a $15 million increase in revenue due to improved administration in FY 1996, $30 million in FY 1997, and $50 million per year in FY 1998 and thereafter.

8. Funding for Administrative Costs. Section 1403 of Public Law 99-662 created the Harbor Maintenance Trust Fund (by amending subchapter A of Chapter 98 of the Internal Revenue Code of 1954). This section also authorized the Department of the Treasury to obtain, annually, up to $5 million to administer the Harbor Maintenance Fee and Trust Fund. This

money was to be appropriated from the Merchandise Processing Fee authorized under the Consolidated Omnibus Budget Reconciliation Act of 1985. However, a 1987 report issued by a panel convened under the General Agreement on Tariff and Trade (GATT) found that, to be consistent with the GATT, expenditures of funds collected under the U. S. Merchandise Processing Fee must be for services related to the process of customs entry of the merchandise. This effectively nullified Treasury's ability to use its existing authority to obtain the needed $5 million for administering the HMF and HMTF. After several attempts, Congress rectified this problem in December 1993, with the passage of Section 683 of Public Law 103-182, the North American Free Trade Agreement Implementation Act. This authorizes up to $5 million to be appropriated from the Harbor Maintenance Trust Fund annually for the administrative costs of the Department of the Treasury, the Army Corps of Engineers, and the Department of Commerce. Plans are underway to seek appropriations in FY 1996. It is anticipated that each agency will budget for its respective share of the $5 million, of which Customs would receive the majority of the funding for audits and enforcement. Over the next three years, this is expected to further increase collections, correct the suspected deficiencies in collections which currently exist, and bring collections to near full compliance by the end of FY 1998.

HARBOR MAINTENANCE TRUST FUND

9. Harbor Maintenance Trust Fund Revenue and Transfers. The following table summarizes the revenues received into the Harbor Maintenance Trust Fund and transfers from the Trust Fund for the last six years. The table is prepared from data provided by the Funds Accounting Branch, Financial Management Services, of the Department of the Treasury. Revenues shown in this table will not agree with actual collections reported by the U.S. Customs Service because of the time it takes for Treasury to account for revenue transfers from the U.S. Customs Service. Reconciliation between actual collections by Customs and revenue estimates made by Treasury are made each month; however, end of year differences are inevitable. The Financial Management Services, Department of the Treasury, is the official source of Trust Fund balances and disbursements and is the only source of obtaining interest income attributed to the HMTF. The following table represents the official status of the HMTF.

Harbor Maintenance Trust Fund
Revenues and Transfers
FY 1988 through FY 1993
(thousands of dollars)

	FY 1988	FY 1989	FY 1990
Beginning Balance:	$15,198.9	$9,714.9	$12,311.5
Revenues:			
Harbor Maintenance Fee	144,001.0	166,000.0	180,493.0
Toll Receipts	10,447.5	9,806.4	8,849.3
Interest	6.528.2	7,342.8	8,280.6
Net Revenues:	160,976.7	183,149.2	197,622.9
Net Available:	176,175.6	192,864.1	209,934.4

	FY 1991	FY 1992	FY 1993
Beginning Balance:	$30,253.6	$72,793.9	$120,930
Revenues:			
Harbor Maintenance Fee	374,420.0	505,827.0	628,462
Toll Receipts	9,266.6	8,733.0	8,739
Interest	11,814.3	16,519.9	13,521
Net Revenues:	395,500.9	531,079.9	650,722
Net Available:	425,754.5	603,873.8	771,652

	FY 1988	FY 1989	FY 1990
Transfers:			
Corps of Engineers	148,000.0	159,026.0	159,073.7
St. Lawrence Seaway	9,424.0	10,382.0	11,397.0
SLS Toll Rebates	8,894.5	10,977.3	9,041.5
Dept. of Transportation*	0.0	0.0	0.0
Administration Costs	142.1	167.3	168.6
Net Expenditures:	166,460.7	180,552.6	179,680.8
Surplus/(Deficit):	$9,714.9	$12,311.5	$30,253.6

	FY 1991	FY 1992	FY 1993
Corps of Engineers	333,401.5	462,229.2	446,164
St. Lawrence Seaway	9,075.0	10,949.9	13,584
SLS Toll Rebates	10,297.8	9,565.0	8,074
Dept. of Transportation*	0.0	16.0	160
Administration Costs	186.3	184.0	124
Net Expenditures:	352,960.6	482,944.1	468,106
Surplus/(Deficit):	$72,793.9	$120,929.7	$303,546

Source: Funds Accounting Branch, Financial Management Services, Department of the Treasury

* Payment of rent for the St. Lawrence Seaway Development Corporation as authorized by Title 1, Public Law 102-143.

10. Harbor Maintenance Trust Fund Balances. According to the Income Statement of the Financial Management Services Division of the Department of the Treasury, the FY 1993 surplus was $182,615,714.97. This "surplus" continues to be of concern and is in part the result of the absence to date of authorizing legislation to allow the National Oceanic and Atmospheric Administration to receive approximately $45.5 million per year from the Trust Fund. A second contributing factor is that the O&M budget of the Army Corps of Engineers to date has been less than had been projected in 1990 when the new *ad valorem* rate of 0.125 percent was established. HMF collections have been only slightly less than projected at that time. This has resulted in a grow-

ing surplus in the HMTF account. Although on December 8, 1993, Section 683 of Public Law 103-182 was signed into law, authorizing the withdrawal of the $5 million per year from the Trust Fund to improve the administration of the Fund and for enforcement purposes, no funds have been appropriated to date. While better administration and enforcement would tend to add to the HMTF surplus by increasing collections, the Administration supports appropriating these funds.

11. Harbor Maintenance Trust Fund Projections. The following table displays anticipated deposits, withdrawals, and Trust Fund balances through FY 1998. The projections assume appropriations of $5 million for administering the HMF and HMTF will be forthcoming in FY 1996. If this does not occur, annual Trust Fund receipts are likely to be reduced by $15 million to $50 million as described earlier. The projections also assume that Congress will pass legislation for FY 1995 to enable NOAA to receive funding for its commercial navigation activities from the HMTF.

Harbor Maintenance Trust Fund
Projected Revenues and Transfers
FY 1993 through FY 1998
(thousands of dollars)

	FY 1993	FY 1994	FY 1995
Beginning Balance:	$120,930	$303,546	$453,137
Revenues:			
Harbor Maintenance Fee	628,462	615,000	630,400
Toll Receipts	8,739	9,480	9,570
Interest	13,521	22,913	25,359
Net Revenues:	650,722	647,393	665,329
Net Available:	771,652	950,939	1,118,466

	FY 1996	FY 1997	FY 1998
Beginning Balance:	$590,389	$689,849	$809,204
Revenues:			
Harbor Maintenance Fee	661,200	692,355	728,914
Toll Receipts	9,670	9,770	9,870
Interest	28,278	31,228	52,852
Net Revenues:	699,148	733,353	791,636
Net Available:	1,289,537	1,423,202	1,600,840

	FY 1993	FY 1994	FY 1995
Transfers:			
Corps of Engineers	446,164	476,890	462,000
St. Lawrence Seaway	13,584	10,915	10,963
SLS Toll Rebates	8,074	9,707	9,319
Dept. of Transportation	160	165	170
Admin. (Treasury; Corps; Commerce)	124	125	125
NOAA (Proposed Legislation)	0	0	45,500
Net Transfers:	468,106	497,802	528,077
Surplus/(Deficit):	$303,546	$453,137	$590,389

	FY 1996	FY 1997	FY 1998
Transfers:			
Corps of Engineers	528,000	542,000	554,000
St. Lawrence Seaway	11,177	11,382	11,253
SLS Toll Rebates	9,836	9,941	10,047
Dept. of Transportation	175	175	175
Admin. (Treasury; Corps; Commerce)	5,000	5,000	5,000
NOAA (Proposed Legislation)	45,500	45,500	45,500
Net Transfers:	599,688	613,998	625,975
Surplus/(Deficit):	$689,849	$809,204	$974,865

* FY 1993 figures are those reported by Financial Management Services, Department of the Treasury; FY 1994 and beyond are budget data from the respective agencies cited.

12. Challenge by the European Community Members of the General Agreement on Tariff and Trade (GATT). In 1992, the European Community (EC) members of GATT requested a formal "consultation" concerning the appropriateness of the Harbor Maintenance Fee within the context of GATT. Issues included the *ad valorem* nature of the fee, the nature of the expenditures made on behalf of commercial navigation, and verification that the domestic sector of the U.S. economy also was paying the fee. Of special concern was the growing surplus of the Harbor Maintenance Trust Fund. The Assistant Secretary of the Army (Civil Works) sent a representative to Geneva who, with a legal advisor from the Office of the U.S. Trade Representative, addressed these issues with the EC members of GATT. Additional consultations have not been requested to date. It was clear, however, that the EC has been monitoring carefully the Harbor Maintenance Fee and Trust Fund and is ready to file a formal complaint if the administration of the Trust Fund should deviate outside the parameters of the General Agreement on Tariff and Trade. If the surplus continues to grow, it will become more likely that the European Community will again challenge the Harbor Maintenance Fee under the General Agreement on Tariff and Trade.

13. Conclusions. The Harbor Maintenance Trust Fund is meeting its objective of financing 100 percent of the eligible O&M expenditures made on behalf of commercial navigation for the St. Lawrence Seaway Development Corporation and the Army Corps of En-

gineers. There is evidence that improvements in collections can be made, particularly in the domestic sector and, to a lesser extent, from exporters. Full funding of the $5 million is needed to improve both the domestic and international credibility of the Trust Fund. Passage of enabling legislation for NOAA would reduce the projected surplus in the HMTF in a manner consistent with the objectives for which the Fund was first created.

BRIEFING BOOK AND FACT SHEETS

on the

HARBOR MAINTENANCE FEE AND TRUST FUND
(Title XIV, PL 99-662)

for

U.S. Army Corps of Engineers
20 Massachusetts Av. N.W.
Washington, D.C. 20314
(202) 504-4312

14 February 1990

Harbor Maintenance Trust Fund

ISSUE:

Request was made on 2 Feb 90 for information as to how much Operation and Maintenance (O&M) expenditures are eligible for recovery from the Harbor Maintenance Trust Fund; how much other harbor work is funded out of the trust fund; and how much O&M is not subject to recovery from the trust fund. The following Fact Sheet describes how eligible O&M is defined, and how amounts subject to recovery are calculated and transferred to the Corps of Engineers.

CURRENT AUTHORIZATION:

The Harbor Maintenance Trust Fund was authorized under Title 14 of the Water Resources Development Act of 1986, (Public Law 99-662). Section 210, "Authorization of Appropriations," of that Act reads as follows:

(a) Trust Fund—There are authorized to be appropriated out of the Harbor Maintenance Trust Fund, established by section 9505 of the Internal Revenue Code of 1954, for each fiscal year such sums as may be necessary to pay—

(1) 100 percent of the eligible operations and maintenance costs of those portions of the Saint Lawrence Seaway operated and maintained by the Saint Lawrence Seaway Development Corporation for such fiscal year; and

(2) not more than 40 percent of the eligible operation and maintenance costs assigned to commercial navigation of all harbors and inland harbors within the United States.

HOW THE TRUST FUND WORKS:

The Corps of Engineers does not receive money from the Harbor Maintenance Trust Fund to finance the operation and maintenance of an individual port. There is also no relationship between the amount of money spent on a port's maintenance, and the amount of revenue collected from cargo moving in or out of that particular port. The Corps of Engineers appropriation process is the same as it has always been; funds are requested from Congress based upon the anticipated maintenance needs of the nation's ports. About two weeks before the close of the fiscal year, the Trust Fund revenue is compared to the previous year's eligible expenditures. These expenditures are certified by the Corps, and the Department of Treasury transfers the appropriate amount from the Harbor Maintenance Trust Fund to the General Treasury. If eligible expenditures exceed the balance in the Trust Fund, the entire amount is transferred to the General Treasury. If receipts exceed expenditures, the balance remains in the Trust Fund.

DEFINING NAVIGATION COSTS SUBJECT TO RECOVERY:

At the time the Harbor Maintenance Fee (HMF) legislation was being formulated, a Navigation Cost Data Base was developed for this purpose. Projects included in the data base were those which have had construction, operation, or maintenance expenditures made on their behalf since 1977. Recorded were the navigation O&M cost or expenditure. Navigation O&M cost was defined as an O&M expenditure made on a project authorized for commercial navigation.

This included multi-purpose as well as single-purpose navigation projects. After the Water Resources Development Act of 1986 (PL 99-662) was passed, a listing of these projects was provided the Assistant Commissioner of the U.S. Customs Service in a letter, enclosed, dated 13 Feb 87. This correspondence is at TAB D

COSTS BY CATEGORY AND PROJECT:

For a given year, the above projects are divided into three categories. The first is shallow draft projects subject to the Inland Waterway Fuel Tax; cargo utilizing these inland projects is not subject to the Harbor Maintenance Fee. A second category is the deep-draft projects which service harbors subject to the Harbor Maintenance Fee. The third and final category is the remaining shallow-draft inland projects not subject to the fuel tax. These are identified in the enclosed tables as Tables 11-S, 1-D, and 21-S, respectively at TAB E.

UNITED STATES GENERAL ACCOUNTING OFFICE

GAO

Report to the Honorable
Mark O. Hatfield, U.S. Senate

December 1991

U.S. CUSTOMS SERVICE

Limitations in Collecting Harbor Maintenance Fees

[Seal Omitted]

GAO/GGD-92-25

GAO United States
General Accounting Office
Washington, D.C. 20548

General Government Division

B-245948

December 23, 1991

The Honorable Mark O. Hatfield
United States Senate

Dear Senator Hatfield:

In response to your request, we reviewed the U.S. Customs Service's efforts to collect the fee for use of harbors and ports—the harbor maintenance fee (HMF). Cargo importers, exporters, domestic shippers of cargo between ports in the United States, foreign trade zone (FTZ) users,[1] and passenger vessel operators are to pay the HMF on the basis of the value (ad valorem) of cargo and passenger fares. Collections from the fee are primarily used to pay the U.S. Army Corps of Engineers' costs for improving and maintaining ports and harbors. You believed that importers may be correctly paying the fee but expressed concerns that the other parties were not.

[1] Foreign or "free" trade zones are secured areas within the United States that have been established to encourage U.S. participation in international trade.

You also believed that such an inequity would raise questions about the consistency of compliance and the adequacy of HMF collections. We agreed with your office to (1) obtain information on collections and (2) review Customs' internal controls over collections.

To address these issues, we reviewed documents and procedures, interviewed officials, and observed the processes that were used in collecting the HMF. However, we did not test the controls of collecting the HMF. Our work was done from February 1991 through September 1991 using generally accepted government auditing standards. a detailed discussion of our objectives, scope, and methodology is presented in appendix I.

Results in Brief

From Apr. 1, 1987, when collections began, through September 30, 1991, Customs reported HMF collections of just over $916 million. Imports accounted for about 67 percent of this amount ($616 million).

Customs has more controls over HMF collections from importers than it does over payments from exporters, domestic shippers, FTZ users, and passenger vessel operators. Collecting the HMF on imports was incorporated into Customs' existing import process, which also collects import duties and other fees. Customs' import

process has controls to track imported goods from the time they come into the country so it can identify whether import duties have been paid. Importers paid Customs over

* * * * *

When a cargo-carrying ship enters the United States, the carrier is to report its arrival to Customs and submit a report, called a manifest, listing the cargo aboard the vessel. This cargo information serves as an inventory record. If the quantity of goods reported by the carrier on the manifest differs from the quantity reported by the importer or its representative (broker) on the documents filed with Customs for collection purposes, the system is to produce a discrepancy report for reconciliation.

After the importer or broker submits documentation on the cargo and Customs allows the cargo to leave the port for use in the United States, the system is to establish payment dates, giving the importer or broker 10 days from the date that the cargo leaves the port to pay the duties and fees, including the HMF. HMF payments, along with import duties, are to be made to cashiers located at port facilities. If payments are not received by the payment dates, the system is to generate late reports for follow-up. Once collections are received at the port

facilities, they are to be deposited to the United States Treasury.

At the same time importers or brokers submit payments, they are also required to submit documents describing the shipment, declaring its value, and showing how duties and fees were calculated on individual shipments. The information is to be subjected to automated system edits to detect possible problems such as valuation problems that could affect the amount of HMF owed. Customs' import specialists, who are knowledgeable of specific commodity groups and merchandise values, are to further review shipment information selected by the system for accuracy.

The controls available for imports were designed to enable Customs to (1) track cargo to ensure that payments are received and (2) assess the reasonableness of the cargo values. According to Customs officials, because resources are primarily devoted to the import process, Customs chose to adopt different controls over other HMF payments.

Controls Over HMF Payments From Exporters and Domestic Shippers Are Not Being FullyUsed

Customs receives HMF payments from exporters and domestic shippers quarterly. These parties are to complete each quarter an HMF payment form summarizing the value of their shipments. The parties calculate the HMF due on the value they claimed and submit the HMF form along with payments to a lockbox. The lockbox is a postal rental box serviced by a commercial bank that processes HMF payments and deposits them to the United States Treasury. During fiscal year 1991, HMF payments from

* * * * *

HIGHLY QUALIFIED DATA
NOT FOR PUBLICATION OR DISTRIBUTION

1992*
Estimated Receipts**
Harbor Maintenance Fee
from
Cargo Transiting Major Ports

Rank	Port Name	Value of Exports & Imports	HMF	FY-92 O&M Expenditure
1	Los Angeles ***	$62,969,000,000	$78,711,000	$ 162,000
2	NY/NJ	53,072,000,000	68,840,000	18,313,500
3	Long Beach ***	50,428,000,000	63,035,000	(see Los Angeles)
4	Seattle	26,879,000,000	33,598,750	6,659,300
5	Houston	25,020,000,000	31,275,000	2,582,000
6	Oakland	24,124,000,000	30,155,500	1,420,700
7	Tacoma	22,950,000,000	28,687,500	135,500
8	Hampton Roads	19,481,000,000	24,351,250	5,434,300
9	Baltimore	16,862,000,000	21,077,500	16,687,900
10	Portland, Oregon	15,407,000,000	19,258,750	18,650,000

* Value of cargo and revenue estimates are by calendar year; expenditures are by Fiscal Year. Value of Cargo data is from Bureau of Census.

** Revenue estimates are very approximate; may include exempt cargo; does not include domestic cargo subject to fee;

*** Expenditures shown are for Los Angeles and Long Beach combined

11	Charleston	14,320,000,000	17,900,000	6,476,300
12	Miami	13,888,000,000	17,360,000	683,900
13	New Orleans	12,698,000,000	15,872,500	11,720,500
14	Savannah	11,452,000,000	14,315,000	4,679,900
15	S. Louisiana****	11,205,000,000	14,006,.250	36,816,900
16	Jacksonville	8,850,000,000	11,062,500	290,800
17	Philadelphia	6,626,000,000	8,282,500	15,521,900
18	Port Everglades	5,104,000,000	6,380,000	0
19	Port Huron	5,089,000,000	6,361,250	1,059,600
20	San Francisco	4,395,000,000	5,493,750	4,343,900

**** Expenditures shown are for "Mississippi River, Baton Rouge to the Gulf"

Notice: Corps of Engineers cost accounts are maintained under the authorizing project name only. Some projects service more than one port (e.g. "Mississippi River, Baton Rogue to the Gulf". Expenditures are not allocated among these ports, but rather are shown under the predominant port name, (e.g. Baton Rouge)

HIGHLY QUALIFIED DATA. NOT FOR PUBLICATION OR DISTRIBUTION

[0996-A Y1.1/F:104-004]
104th Congress 1st Session _____ H.Doc. 104-004

APPENDIX

[Seal Omitted]

BUDGET OF THE UNITED STATES GOVERNMENT

Fiscal Year 1996

Intragovernmental funds—Continued

RIVERS AND HARBORS CONTRIBUTED FUNDS—Continued

Personnel Summary

Identification code 96-8862-0-7-301	1994 actual	1995 est.	1996 est.
1001 Total compensable workyears: Full-time equivalent employment	926	915	909

HARBOR MAINTENANCE TRUST FUND

Unavailable Collections (in thousands of dollars)

Identification code 96-8863-0-7-301	1994 actual	1995 est.	1996 est.
Balance, start of year:			
01.99 Balance, start of year	302,300	451,384	644,270
Receipts:			
02.01 User fees	622,253	634,700	679,100
02.02 Earnings on investments	12,826	30,596	38,447
02.03 Transfer of tolls from the Saint Lawrence Seaway Development Corporation	11,112		
02.99 Total receipts	646,191	665,296	717,547
04.00 Total: Balances and collections	948,491	1,116,680	1,361,817
Appropriation:			
05.01 Saint Lawrence Seaway Development Corporation, operations and maintenance	-10,765	-10,229	-10,243
05.02 Saint Lawrence Seaway Development Corporation, rental payments	-175	-181	-169
05.03 Army Corps of Engineers, operation and maintenance of commercial navigation harbors and administrative costs	-476,620	-462,000	-500,000
05.04 Saint Lawrence Seaway toll rebate program	-9,547		
05.05 National Oceanic and Atmospheric Administration, commercial navigation and related activities (proposed legislation)			-45,500
05.06 Department of the Treasury, Customs Service: administrative expenses			-3,000
05.99 Subtotal appropriation	-497,107	-472,410	-558,912
07.99 Total balance, end of year	451,384	644,270	802,905

Program and Financing (in thousands of dollars)

Identification code 96-8863-0-7-301	1994 actual	1995 est.	1996 est.
Program by activities:			
10.00 Total obligations (object class 25.2)	476,620	462,000	500,000
Financing:			
39.00 Budget authority	476,620	462,000	500,000
Budget authority:			
Appropriation (trust fund, definite):			
40.26 Appropriation (trust fund, definite)	476,620	462,000	499,000
40.26 Appropriation (trust fund, definite)			1,000
43.00 Appropriation (total)	476,620	462,000	500,000
Relation of obligations to outlays:			
71.00 Total obligations	476,620	462,000	500,000
80.00 Outlays	476,620	462,000	500,000

The Harbor Maintenance Trust Fund is established in accordance with the Harbor Maintenance Revenue Act of 1986 (Public Law 99–662, Title XIV, as amended). Under law, revenue is derived from receipts from a 0.125 percent *ad valorem* user fee imposed on commercial cargo loaded and unloaded at specified U.S. ports open to public navigation.

The Harbor Maintenance Revenue Act also authorized expenditures from the Trust Fund to finance up to 100 percent of Corps of Engineers' harbor operation and maintenance (O&M) costs, including O&M costs associated with Great Lakes navigational projects, and fully finance the operation and maintenance of the Saint Lawrence Seaway Development Corporation.

The North American Free Trade Agreement Implementation Act, Sec. 683 (Public Law 103–182), authorized payment of administrative expenses incurred by the Department of the Treasury, the Army Corps of Engineers, and the Department of Commerce related to administration of the harbor maintenance fee, but not to exceed $5,000,000 for any fiscal year. The Corps of Engineers has budgeted $1,000,000 for anticipated expenses associated with administration of the harbor maintenance fee.

Legislation will be proposed by the National Oceanic and Atmospheric Administration (NOAA) to fund programs that benefit the commercial navigation industry.

For appropriation language, see the following accounts: Army Corps of Engineers, Civil "Operation and Maintenance, General"; St. Lawrence Seaway Development Corporation "Operations and Maintenance"; Department of Transportation "Rental Payments" and Department of the Treasury "Administration of Harbor Maintenance Trust Fund".

COASTAL WETLANDS RESTORATION CONSOLIDATED PROGRAM

(Budget authority in thousands of dollars)

	1994 actual	1995 est.	1996 est.
Coastal Wetlands Restoration Trust	34,939	34,958	36,981
Rivers and harbors contributed funds (permanent appropriation)	0	10,173	10,576
Total appropriation	34,939	45,131	47,557

COASTAL WETLANDS RESTORATION TRUST FUND

Program and Financing (in thousands of dollars)

Identification code 96-8333-0-7-301	1994 actual	1995 est.	1996 est.
Program by activities:			
10.00 Total obligations	17,749	22,605	23,000
Financing:			
21.40 Unobligated balance available, start of year: Treasury balance	-51,452	-68,642	-80,595
24.40 Unobligated balance available, end of year: Treasury balance	68,642	80,595	94,976
62.00 Budget authority (transferred from other accounts)	34,939	34,958	36,981
Relation of obligations to outlays:			
71.00 Total obligations	17,749	22,605	23,000
72.40 Obligated balance, start of year: Unpaid obligations: Treasury balance	4,823	13,042	10,000
74.40 Obligated balance, end of year: Unpaid obligations: Treasury balance	-13,042	-10,000	-11,000
90.00 Outlays	9,530	25,647	22,000

In 1990, the Coastal Wetlands Planning, Protection and Restoration Act (Public Law 101–646) authorized transfer of 18 percent of each annual appropriation from the Sport Fish Restoration Account for coastal wetlands activities; 70 percent of this amount is allocated to the Corps of Engineers for use by the Louisiana Coastal Wetlands Conservation and Restoration Task Force, chaired by the Secretary of the Army, to provide for the long-term conservation, protection, and restoration of coastal wetlands in the State of Louisiana. The Coastal Wetlands Restoration Trust Fund is established to receive these funds and finance the appropriate activities.

Object Classification (in thousands of dollars)

Identification code 96-8333-0-7-301	1994 actual	1995 est.	1996 est.
Personnel compensation:			
11.1 Full-time permanent	1,454	1,686	1,415
11.3 Other than full-time permanent		104	87
11.5 Other personnel compensation		67	57
11.9 Total personnel compensation	1,454	1,857	1,559

Other	258	258	258
Conviction rate (percent)	55%	55%	55%
Average sentence (years)	NA	NA	NA
Recoveries dollars saved	NA	NA	NA

Object Classification (in thousands of dollars)

Identification code 20-1000-0-1-751	1994 actual	1995 est.	1996 est.
Direct obligations:			
Personnel compensation:			
11.1 Full-time permanent	184,586	187,552	191,580
11.3 Other than full-time permanent	588	1,586	1,612
11.5 Other personnel compensation	27,072	29,129	28,405
11.9 Total personnel compensation	212,596	218,277	221,597
12.1 Civilian personnel benefits	65,065	65,418	68,252
13.0 Benefits for former personnel	109	115	115
21.0 Travel and transportation of persons	9,302	10,028	9,833
22.0 Transportation of things	1,223	1,133	1,094
23.1 Rental payments to GSA	34,021	35,354	36,399
23.3 Communications, utilities, and miscellaneous charges	14,586	13,514	13,064
24.0 Printing and reproduction	1,710	1,388	1,382
25.2 Other services	25,759	28,529	29,241
26.0 Supplies and materials	6,324	6,924	6,381
31.0 Equipment	3,267	7,678	12,718
42.0 Insurance claims and indemnities	516	319	329
99.0 Subtotal, direct obligations	375,209	388,668	400,805
99.0 Reimbursable obligations	24,111	15,044	10,471
99.9 Total obligations	399,400	401,702	411,356

Personnel Summary

Identification code 20-1000-0-1-751	1994 actual	1995 est.	1996 est.
Direct:			
Total compensable workyears:			
1001 Full-time equivalent employment	4,128	4,074	4,056
1005 Full-time equivalent of overtime and holiday hours	41	41	41
Reimbursable:			
Total compensable workyears:			
2001 Full-time equivalent employment	130	136	112
2005 Full-time equivalent of overtime and holiday hours	1	1	1

Internal Revenue Collections for Puerto Rico

Program and Financing (in thousands of dollars)

Identification code 20-5737-0-2-806	1994 actual	1995 est.	1996 est.
Program by activities:			
10.00 Total obligations (object class 41.0)	200,670	225,677	232,447
Financing:			
60.25 Budget authority (appropriation) (special fund, indefinite)	200,670	225,677	232,447
Relation of obligations to outlays:			
71.00 Total obligations	200,670	225,677	232,447
90.00 Outlays	200,670	225,677	232,447

Excise taxes collected under the Internal Revenue laws of the United States on articles produced in Puerto Rico and either transported to the United States or consumed on the island are paid to Puerto Rico (26 U.S.C. 7652).

UNITED STATES CUSTOMS SERVICE

Federal Funds

General and special funds:

Salaries and Expenses

For necessary expenses of the United States Customs Service, including purchase of up to 1,000 motor vehicles of which 960 are for replacement only, including 990 for police-type use and commercial operations; hire of motor vehicles; not to exceed $20,000 for official reception and representation expenses; and awards of compensation to informers, as authorized by any Act enforced by the United States Customs Service; [$1,394,783,000] *$1,381,550,000*, of which such sums as become available in the Customs User Fee Account, except sums subject to section 13031(f)(3) of the Consolidated Omnibus Reconciliation Act of 1985, as amended (19 U.S.C. 58c(f)(3)), shall be derived from that Account; of the total, not to exceed $150,000 shall be available for payment for rental space in connection with preclearance operations, and not to exceed $4,000,000 shall be available until expended for research: *Provided*, That uniforms may be purchased without regard to the general purchase price limitation for the current fiscal year[: *Provided further*, That $750,000 shall be available for additional part-time and temporary positions in the Honolulu Customs District: *Provided further*, That $10,000,000 shall be available for the Center for Study of Western Hemispheric Trade as authorized by Public Law 103–182: *Provided further*, That of the offsetting collections credited to this account, $410,000 are permanently canceled: *Provided further*, That Customs shall achieve a minimum full-time equivalent staffing level of 17,524 during fiscal year 1995: *Provided further*, That $800,000 shall remain available until expended for the construction of a replacement fence within the city limits of Nogales, Arizona under the authority of section 69, title 19, United States Code]. *(Treasury Department Appropriations Act, 1995.)*

Program and Financing (in thousands of dollars)

Identification code 20-0802-0-1-751	1994 actual	1995 est.	1996 est.
Program by activities:			
Direct program:			
00.01 Inspection and control	752,851	809,125	832,520
00.02 Enforcement	479,308	434,353	448,588
00.03 Tariff and trade	314,192	312,975	383,429
00.91 Total direct program	1,548,211	1,556,453	1,644,555
01.01 Reimbursable program	253,403	392,498	311,676
10.00 Total obligations	1,839,614	1,581,551	1,956,331
Financing:			
17.00 Recovery of prior year obligations	-1,562		
21.40 Unobligated balance available, start of year: Treasury balance	-194,811	-208,040	-268,370
22.00 Unobligated balance transferred, net	-3,372		
24.40 Unobligated balance available, end of year: Treasury balance	208,040	268,370	481,714
25.00 Unobligated balance expiring	8,340		
39.00 Budget authority (gross)	1,914,249	2,084,281	2,069,875
Budget authority:			
Current:			
40.00 Appropriation	772,595	735,042	708,804
40.25 Appropriation (special fund, indefinite)	577,673	658,751	672,946
40.75 Procurement reduction pursuant to P.L. 103-329		-2,142	
42.00 Transferred from other accounts	9,587	4,196	
43.00 Appropriation (total)	1,359,855	1,395,847	1,381,550
Permanent:			
60.05 Appropriation (indefinite)	280,181	354,936	376,249
68.00 Spending authority from offsetting collections	253,403	392,498	311,676
Relation of obligations to outlays:			
71.00 Total obligations	1,839,614	1,581,551	1,956,331
Obligated balance, start of year:			
72.10 Receivables from other government accounts	-80,457	-83,589	-85,089
72.40 Unpaid obligations: Treasury balance	294,023	288,567	281,430
Obligated balance, end of year:			
74.10 Receivables from other government accounts	93,589	85,089	94,289
74.40 Unpaid obligations: Treasury balance	-288,567	-281,430	-279,322
77.00 Adjustments in expired accounts	-12,513		
78.00 Adjustments in unexpired accounts	-1,562		
87.00 Outlays (gross)	1,853,577	1,581,089	1,957,709
Adjustments to gross budget authority and outlays:			
Offsetting collections from:			
88.00 Federal sources	-188,553	-192,328	-198,353
88.40 Non-Federal sources	-198,850	-110,170	-113,323
88.90 Total, offsetting collections	-253,403	-302,498	-311,676
89.00 Budget authority (net)	1,820,846	1,781,783	1,757,799

General and special funds—Continued

MISCELLANEOUS PERMANENT APPROPRIATIONS—Continued

Object Classification (in thousands of dollars)—Continued

Identification code 20-9922-0-2-806		1994 actual	1995 est.	1996 est.
11.5	Other personnel compensation	1,040	1,086	1,147
11.8	Special personal services payments	36	37	39
11.9	Total personnel compensation	13,070	14,902	15,737
12.1	Civilian personnel benefits	4,050	4,547	4,802
21.0	Travel and transportation of persons	678	769	812
22.0	Transportation of things	76	108	114
23.1	Rental payments to GSA	40	54	57
23.2	Rental payments to others	278	375	396
23.3	Communications, utilities, and miscellaneous charges	1,028	1,379	1,456
24.0	Printing and reproduction	-5	7	8
25.1	Advisory and assistance services	4,179	4,304	4,545
25.3	Purchases of goods and services from Government accounts	.....	286	302
26.0	Supplies and materials	667	746	788
31.0	Equipment	1,485	2,061	2,176
32.0	Land and structures	1,350	1,439	1,520
41.0	Payments to the Treasurer of Puerto Rico	135,049	136,225	143,854
44.0	Refunds	10,836	11,209	11,545
99.0	Subtotal, direct obligations	172,781	178,412	188,112
99.0	Reimbursable obligations	434	.....	.....
99.9	Total obligations	173,215	178,412	188,112

Personnel Summary

Identification code 20-9922-0-2-806		1994 actual	1995 est.	1996 est.
1001	Total compensable workyears: Full-time equivalent employment	323	365	365

REFUNDS, TRANSFERS, AND EXPENSES; UNCLAIMED AND ABANDONED GOODS

Program and Financing (in thousands of dollars)

Identification code 20-8789-0-7-751		1994 actual	1995 est.	1996 est.
	Program by activities:			
10.00	Total obligations	3,017	3,111	3,204
	Financing:			
17.00	Recovery of prior year obligations	-9	.....	.....
21.40	Unobligated balance available, start of year: Treasury balance	-4,770	-6,038	-6,038
24.40	Unobligated balance available, end of year: Treasury balance	6,038	6,038	6,038
60.27	Budget authority (appropriation) (trust fund, indefinite)	4,277	3,111	3,204
	Relation of obligations to outlays:			
71.00	Total obligations	3,017	3,111	3,204
72.40	Obligated balance, start of year: Unpaid obligations: Treasury balance	2,055	2,129	2,129
74.40	Obligated balance, end of year: Unpaid obligations: Treasury balance	-2,129	-2,129	-2,129
78.00	Adjustments in unexpired accounts	-9	.....	.....
90.00	Outlays	2,935	3,111	3,204

Unclaimed and abandoned goods are held in storage under Customs custody for one year from the date of importation. At the end of that period, all merchandise upon which duties, storage, and other charges have not been paid is appraised and sold at public auction. The proceeds of such sales are deposited in this account. The salaries and expenses account is reimbursed for expenses of such sales and the balance is transferred to the general fund. (19 U.S.C. 528, 1491, 1493, 1559, 1613, 1624).

Object Classification (in thousands of dollars)

Identification code 20-8789-0-7-751		1994 actual	1995 est.	1996 est.
22.0	Transportation of things	31	32	33
25.2	Other services	1,273	1,313	1,352
44.0	Refunds	1,713	1,766	1,819
99.9	Total obligations	3,017	3,111	3,204

HARBOR MAINTENANCE FEE COLLECTION

For administrative expenses related to the collection of the Harbor Maintenance Fee, pursuant to Public Law 103-182, $3,000,000, to be derived from the Harbor Maintenance Trust Fund and to be derived transferred to and merged with the Customs "Salaries and Expenses" account for such purposes.

Program and Financing (in thousands of dollars)

Identification code 20-8870-0-7-751		1994 actual	1995 est.	1996 est.
	Program by activities:			
10.00	Total obligations	.....	.....	3,000
	Financing:			
40.26	Budget authority (appropriation) (trust fund, definite)	.....	.....	3,000
	Relation of obligations to outlays:			
71.00	Total obligations	.....	.....	3,000
72.40	Obligated balance, start of year: Unpaid obligations: Treasury balance	.....	.....	.....
74.40	Obligated balance, end of year: Unpaid obligations: Treasury balance	.....	.....	-270
90.00	Outlays	.....	.....	2,730

Object Classification (in thousands of dollars)

Identification code 20-8870-0-7-751		1994 actual	1995 est.	1996 est.
23.3	Communications, utilities, and miscellaneous charges	.....	.....	1,500
25.2	Other services	.....	.....	1,500
99.9	Total obligations	.....	.....	3,000

BUREAU OF ENGRAVING AND PRINTING

Federal Funds

Intragovernmental funds:

BUREAU OF ENGRAVING AND PRINTING FUND

Program and Financing (in thousands of dollars)

Identification code 20-4502-0-4-803		1994 actual	1995 est.	1996 est.
	Program by activities:			
	Operating expenses:			
00.01	Engraving and printing	383,315	425,475	442,651
00.02	Space utilized by other agencies	4,545	1,800	1,800
00.03	Other miscellaneous services	1,041	549	549
00.91	Total operating expenses	388,901	427,824	445,000
	Capital investment:			
01.01	Purchase of operating equipment	64,296	78,927	68,854
01.02	Plant alterations and experimental equipment	1,016	1,073	1,146
01.91	Total capital investment	65,312	80,000	70,000
10.00	Total obligations	454,213	507,824	515,000
	Financing:			
21.90	Unobligated balance available, start of year: Fund balance	-142,920	-131,029	-102,330
24.90	Unobligated balance available, end of year: Fund balance	131,029	102,330	82,455
68.00	Budget authority (gross): Spending authority from offsetting collections	442,322	479,125	495,125
	Relation of obligations to outlays:			
71.00	Total obligations	454,213	507,824	515,000

THIRD ANNUAL REPORT TO CONGRESS

ON THE

STATUS OF THE HARBOR MAINTENANCE TRUST FUND

FOR

FISCAL YEAR 1994

BACKGROUND

1. Introduction. This report is being provided in compliance with Section 330 of the Water Resources Development Act of 1992, Public Law 102-580. This is the third Annual Report to Congress on the status of the Harbor Maintenance Fee (HMF) and Trust Fund (HMTF). For more background information on the HMF, please refer to the First Annual Report to Congress, which covered the history of the HMF and HMTF since its inception in 1986.

2. Current Level of Recovery. Section 11214 of the Omnibus Budget Reconciliation Act of 1990, Public Law 101-580, increased the Harbor Maintenance Fee from 0.04 percent to 0.125 percent. This increase went into effect on January 1, 1991. Section 316 of the Water Resources Development Act of 1990, Public Law 101-640, authorized recovery of up to 100 percent of the Army Corps of Engineers eligible Operation and Maintenance (O&M) expenditures made on behalf of commercial navigation. The 0.125 percent *ad valorem* fee also was calculated to be sufficient to reimburse the National Oceanic and Atmospheric Administration (NOAA) on an annual basis approximately $45.5 million (an amount approximately a 0.01 percent *ad valorem* fee) for its activities pertaining to commercial navigation. Despite numerous attempts, the authority to withdraw funds from the HMTF has never been obtained by NOAA, and the revenue intended for its use has been accumulating in the Trust Fund since January 1, 1991. Deposits into the HMTF during Fiscal Year (FY) 1994 totaled $647,560,442.14. This includes $12,825,776.10 in "Interest on Investments" and an additional $1,369,197.27 in "Interest Income—Discount" (which is *not* available for obligation and, therefore, not counted toward the beginning balance for FY 1995). Toll receipts from the St. Lawrence Seaway were $11,112,158.04 during this fiscal year. Both revenue and expenditures will be discussed in more detail later in this report.

COSTS ELIGIBLE FOR RECOVERY

3. Defining Expenditures Eligible for Recovery. Section 210 of Public Law 99-662 authorizes appropriations out of the Harbor Maintenance Trust Fund for 100 percent of the "eligible operations and maintenance costs of those portions of the St. Lawrence Seaway operated and maintained by the St. Lawrence Seaway Development Corporation" and "not more than 40 percent" (amended under Section 316 of Public Law 101-640, the Water Resources Development Act of 1990, to 100 percent) "of the eligible operations and maintenance costs assigned to commercial navigation of all harbors and inland harbors within the United States." Section 210 of Public Law 99-662 refers to the payment of such sums as may be necessary to pay for "eligible operations and maintenance costs assigned to commercial navigation of all harbors and inland harbors within the United States." The Corps of Engineers interprets the term "commercial navigation" referenced in Section 210 to mean any project authorized by Congress with "commercial navigation" as an authorized purpose. O&M costs for these projects are accounted by the Corps of Engineers Management Information System (COEMIS). Transfers for current fiscal year expenditures are based on the actual expenditures of the previous fiscal year; that is, FY 1994 withdrawal is equal to FY 1993 actual expenditures.

4. Army Corps of Engineers Expenditures Eligible for Recovery. Many projects with "commercial navigation" as a project purpose have other authorized purposes as well. Such purposes include recreation, hydropower, flood control, water supply, and the like. Typically, deep draft port projects are single purpose commercial navigation projects, although a few also are authorized for recreation. All O&M expenditures made on behalf of single-purpose commercial navigation projects were considered subject to recovery. Expenditures for other specific purposes, such as hydropower, for example, were not eligible for monies from the HMTF. Joint-use costs were allocated to the project's various purposes in proportion to the benefits realized for each purpose. Appendix A displays annual O&M expenditures eligible for reimbursement from the Harbor Maintenance Trust Fund during FY 1994. Appendix A includes two tables which differentiate between deep draft projects (greater than 14 feet) and shallow draft projects (14 feet and less). These are identified by state and by project name. The Army Corps of Engineers transfers during FY 1994, which represent actual expenditures made during FY 1993, were $476,890,300. (Note: A transfer of $270,000 in FY 1993 was erroneously recorded as a Corps of Engineers outlay by the Department of the Treasury, but was corrected in FY 1994. By making this correction in FY 1994, the Treasury Annual Report understates the actual Corps expenditures by that amount.)

5. Other Expenditures Eligible for HMTF Funding. One hundred percent of the O&M expenditures for the St. Lawrence also are taken from the HMTF. During FY 1994, $10,940,000 was transferred

to the St. Lawrence Seaway Development Corporation for its use in FY 1994, including $175,000 for St. Lawrence Seaway rent payments transferred to the Department of Transportation. In addition, Seaway tolls for that portion under United States jurisdiction are deposited into the Harbor Maintenance Trust Fund but then rebated fully to vessel operating companies that paid the tolls. During FY 1994, $9,546,557.02 in Seaway tolls were returned to vessel operating companies.

6. Discontinuance of St. Lawrence Seaway Tolls. As referenced in the previous paragraph, the St. Lawrence Seaway Development Corporation had been depositing tolls from the U.S. portion of the St. Lawrence Seaway into the Harbor Maintenance Trust Fund and rebating these tolls to vessel operating companies. With the passage of Section 339 of Public Law 103-331, tolls for the U.S. portion of the Seaway have been eliminated as of October 1, 1994, although some delinquent rebates may continue into FY 1995. The operating expenses of the St. Lawrence Seaway will continue to be funded from the HMTF, as before.

7. Use of HMTF for Administrative Expenses. During the 103rd Congress, legislation was enacted which allows the Department of the Treasury, the Army Corps of Engineers, and the Department of Commerce to share a maximum of $5 million per year for expenses incurred in the administration of the HMF and HMTF. Under this law, Section 683 of Public Law 103-182 (107 Stat. 2057), funds were made available as of the beginning of FY 1995; however, enactment was too late to have it included in the FY 1995 budget. Four million dollars has been budgeted for use in FY 1996. One million dollars has been bud-

geted by the Corps to improve its collection and analysis of domestic waterborne commerce subject to the HMF. The remainder of the funds will be available to improve the accuracy and evaluation of shipper export declarations, as well as the evaluation of import records by the U.S. Customs Service. Increases in collections are expected to improve significantly over the next 3-5 years, particularly in the domestic and export sectors. There is every expectation to collect delinquent fees; and to fine those who have intentionally avoided paying the HMF.

HARBOR MAINTENANCE FEE REVENUES

8. Collections and Receipts. All commerce subject to the Harbor Maintenance Fee (imports, exports, and domestic) incurs the same 0.125 percent *ad valorem* fee. Imports lead as a source of revenue paid into the HMTF since they lead in the total volume and value of cargo subject to the fee. Generally, imports tend to consist of higher value commodities (e.g., electronics, automobiles, etc.) while U.S. exports and domestic cargo generally are lower value cargo (e.g., grain, coal, paper, etc.). The following table shows revenue paid into the HMTF since FY 1989, based on actual collections by the U.S. Customs Service, through the last day of each fiscal year.

Harbor Maintenance Fee and Trust Fund
Collections by Source
FY 1989 through FY 1994
(thousands of dollars)

	FY 1989	FY 1990	FY 1991
Imports	$105,927	$109,215	$258,321
Exports	44,618	45,808	93,194
Foreign Trade Zones	3,876	4,020	9,166
Domestics	8,590	9,069	19,518
Passenger	666	559	1,977
Net Collections:	$163,677	$168,671	$382,176

	FY 1992	FY 1993	FY 1994
Imports	$342,402	$361,678	$391,679
Exports	142,916	169,141	168,241
Foreign Trade Zones	16,974	20,959	21,895
Domestics	28,451	31,858	34,558
Passenger	3,275	4,748	4,811
Net Collections:	$534,018	$588,384	$621,184

Source: Office of Inspection and Control, U. S. Customs Service, Department of the Treasury Note: HMF collections will differ from deposits into the HMTF due to reporting time and estimating error.

Total revenue collections shown in this table differ from the "official" HMTF deposits shown in paragraph 12 of this report because the Treasury Income Statement of the HMTF, like the Budget of the United States, must rely on revenue estimates

prepared weeks or months before the close of the fiscal year. The Department of the Treasury reconciles differences between actual fee receipts as reported by the U.S. Customs Service and its estimates on a monthly basis, as well as at the beginning of each fiscal year. Only the U.S. Customs Service reports actual revenue by source. This information is used to monitor receipts on a regular basis and to estimate compliance.

9. Enforcement, Collections, and Shortfalls. The HMF on imports is collected in conjunction with the U. S. customs duty. The mechanism for administrating, collecting, and enforcing customs fees is well established and well enforced. Shipper Export Declarations (SED's) are routinely reported to the Department of Commerce. The export values reported on the SED's were important only for statistical purposes prior to the implementation of the HMF. Now that Congress has authorized the $5 million per year for administering the HMF, with appropriations expected in FY 1996, it should be possible to develop a procedure for better ensuring the accuracy of the fees paid on exports. Domestic vessel operators routinely report tonnage movements to the Army Corps of Engineers Waterborne Commerce Statistical Center; however, the value of this cargo is not available to the vessel operating companies, and the tonnage data have been used for statistical purposes only. Reporting is good, but essentially voluntary. Based on the type and volume of commerce, compared with revenue paid, there appears to be shortfalls by both domestic shippers and exporters.

10. Funding for Administrative Costs. Section 1403 of Public Law 99-662 created the HMTF (by

amending subchapter A of Chapter 98 of the Internal Revenue Code of 1954). This section also authorized the Department of the Treasury to obtain, annually, up to $5 million to administer the HMF and HMTF. This money was to be appropriated from the Merchandise Processing Fee authorized under the Consolidated Omnibus Budget Reconciliation Act of 1985. However, a 1987 report issued by a panel convened under the General Agreement on Tariff and Trade (GATT) found that, to be consistent with the GATT, expenditures of funds collected under the U.S. Merchandise Processing Fee must be for services related to the processing of customs entry of the merchandise. This effectively nullified Treasury's ability to use its existing authority to obtain the needed $5 million for administering the HMF and HMTF. After several attempts, Congress rectified this problem in December 1993, with the passage of Section 683 of Public Law 103-182, the North American Free Trade Agreement Implementation Act. This authorizes up to $5 million to be appropriated from the HMTF annually for the administrative costs of the Department of the Treasury, the Army Corps of Engineers, and the Department of Commerce. The Corps has budgeted $1 million in FY 1996, and the U.S. Customs Service has budgeted $3 million. It is anticipated that the U.S. Customs Service will monitor the accuracy and compliance of exports, as well as imports. Over the next three years, it is expected that collections will increase from $15 million to $50 million, correcting the suspected deficiencies in collections which currently exist and bringing collections to near full compliance by the end of FY 2000.

HARBOR MAINTENANCE TRUST FUND

11. Transfers From the Harbor Maintenance Trust Fund. Recent transfers from the HMF to the Department of Transportation's St. Lawrence Seaway Development Corporation and to the Army Corps of Engineers are shown in the following table.

Transfers from
Harbor Maintenance Trust Fund
FY 1989 through FY 1994
(thousands of dollars)

	FY 1989	FY 1990	FY 1991
Corps of Engineers	$159,026	$159,074	$333,401
St. Lawrence Seaway	10,382	11,397	9,075
SLS Toll Rebates	10,977	9,041	10,298
Dept. of Transportation*	0	0	0
Administration Cost	167	169	186
Net Transfers:	$180,552	$179,681	$352,960

	FY 1992	FY 1993	FY 1994
Corps of Engineers	$462,229	$446,164	$476,890*
St. Lawrence Seaway	10,950	13,584	10,765
SLS Toll Rebates	9,565	8,074	9,546
Dept. of Transportation*	16	160	175
Administration Cost	184	124	—
Net Transfers:	$482,944	$468,106	$497,376

Source: Funds Accounting Branch, Financial Management Services, Department of the Treasury

* As shown in the Department of the Treasury Income Statement and includes $270,000 transfer error.

** Payment of rent for the St. Lawrence Seaway Development Corporation as authorized by Title 1, Public Law 102-143.

12. Harbor Maintenance Trust Fund Revenue and Transfers. The following table summarizes the revenues received into the HMTF and transfers from the HMTF for the last six years. The table is prepared from data provided by the Funds Accounting Branch, Financial Management Services, of the Department of the Treasury. Revenues shown in this table will not agree with actual collections reported by the U.S. Customs Service because of the time it takes for Treasury to account for revenue transfers from the U.S. Customs Service. Reconciliation between actual collections by Customs and revenue estimates made by Treasury are made each month; however, end of year differences are inevitable. The Financial Management Services, Department of the Treasury,

is the official source of HMTF balances and disbursements, and is the only source of obtaining interest income attributed to the HMTF. The following table represents the official status of the HMTF.

Harbor Maintenance Trust Fund
Revenues and Transfers
FY 1989 through FY 1994
(thousands of dollars)

	FY 1989	FY 1990	FY 1991
Beginning Balance:	$9,715	$12,312	$30,254
Revenues:			
Harbor Maintenance Fee	166,000	180,493	374,420
Toll Receipts	9,806	8,849	9,267
Interest	7,343	8,281	11,814
Net Revenues:	183,149	197,623	395,501
Net Available:	192,864	209,935	425,755
Transfers:			
Corps of Engineers	159,026	159,074	333,401
St. Lawrence Seaway	10,382	11,397	9,075
SLS Toll Rebates	10,977	9,041	10,298
Dept. of Transportation*	0	0	0
Administration Costs	167	169	186
Net Expenditures:	180,552	179,681	352,960
Surplus/(Deficit):	$12,312	$30,254	$72,795

	FY 1992	FY 1993	FY 1994
Beginning Balance:	$72,795	$120,931	$303,277
Revenues:			
Harbor Maintenance Fee	505,827	628,462	622,253
Toll Receipts	8,733	8,739	11,112
Interest	16,520	13,521	12,826
Net Revenues:	531,080	650,722	646,191
Net Available:	603,875	771,653	949,468
Transfers:			
Corps of Engineers	462,229	446,434	476,620
St. Lawrence Seaway	10,950	13,584	10,765
SLS Toll Rebates	9,565	8,074	9,546
Dept. of Transportation*	16	160	175
Administration Costs	184	124	(Note 1)
Net Expenditures:	482,944	468,376	$497,106
Surplus/(Deficit):	$120,931	$303,277	$452,360

Source: Funds Accounting Branch, Financial Management Services, Department of the Treasury (Corrected for $270,000 error in the Treasury Income Statement in the Corps transfer account for FY 94)

* Payment of rent for the St. Lawrence Seaway Development Corporation as authorized by Title 1, Public Law 102-143.

Note 1: Administrative Costs are exclusively for the SLS Toll Rebates and are included in that cost category.

13. Harbor Maintenance Trust Fund Balances. According to the Income Statement of the Financial Management Services Division of the Department of the Treasury, the FY 1994 surplus was $150,183,583.12, resulting in a total surplus of $453,729,092.32 as of September 30, 1994, including $1,369,197.27 in "Interest Income—Discount" which is not available for obligation and not counted toward the beginning balance for FY 1995. This "surplus" continues to be of concern and is in part the result of the absence to date of authorizing legislation to allow the NOAA to receive approximately $45.5 million per year from the Trust Fund. A second contributing factor is that the required O&M of the Army Corps of Engineers has been less than had been projected in 1989 when the new *ad valorem* rate of 0.125 percent was established. As expenditures from the HMF have declined, collections have been only slightly less than projected at that time. This has resulted in a growing surplus in the HMTF account. On December 8, 1993, Section 683 of Public Law 103-102 was signed into law, authorizing the withdrawal of up to $5 million per year from the Trust Fund to improve the administration of the Fund and for enforcement purposes. Four million dollars has been budgeted for FY 1996. While better administration and enforcement would tend to add to the HMTF surplus by increasing collections, the Administration supports appropriating these funds to reach full compliance across all types of shippers.

14. Harbor Maintenance Trust Fund Projections. The following table displays anticipated deposits, withdrawals, and Trust Fund balances through FY 1999. The projections assume FY 1996 appropriations of $4 million for administering the HMF and HMTF. If this does not occur, annual revenue projections are likely to be reduced as described earlier. The projections also assume that Congress will pass legislation to enable NOAA to fund its commercial navigation activities from the HMTF.

Harbor Maintenance Trust Fund
Projected Revenues and Transfers
FY 1993 through FY 1998
(thousands of dollars)

	FY 1994	FY 1995	FY 1996
Beginning Balance:	$303,277	$452,360	$645,246
Revenues:			
Harbor Maintenance Fee	622,253	634,700	679,100
Toll Receipts	11,112	N/A	N/A
Interest	12,826	30,596	38,447
Net Revenues:	645,191	665,296	717,547
Net Available:	949,458	1,117,656	1,362,793
Transfers:			
Corps of Engineers	476,620	462,000	499,000
St. Lawrence Seaway	10,765	10,229	10,243
SLS Toll Rebates	9,546	N/A	N/A
Dept. of Transportation	175	181	169
Admin. (Treasury; Corps; Commerce)	0	0	4,000
NOAA (Proposed Legislation)	0	0	45,500
Net Transfers:	497,106	472,410	558,912
Surplus/(Deficit):	$452,360	$645,246	$558,912

	FY 1997	FY 1998	FY 1999
Beginning Balance:	$803,881	$1,031,195	$1,318,805
Revenues:			
Harbor Maintenance Fee	724,416	764,034	790,975
Toll Receipts	N/A	N/A	N/A
Interest	46,814	58,492	73,025
Net Revenues:	771,230	822,526	864,000
Net Available:	1,575,111	1,853,721	2,183,805
Transfers:			
Corps of Engineers	484,000	474,000	464,000
St. Lawrence Seaway	10,243	10,243	10,243
SLS Toll Rebates	N/A	N/A	N/A
Dept. of Transportation	173	173	157
Admin. (Treasury; Corps; Commerce)	4,000	4,000	4,000
NOAA (Proposed Legislation)	45,500	45,000	45,500
Net Transfers:	543,916	533,916	523,900
Surplus/(Deficit):	$1,031,195	$1,319,805	$1,659,905

* FY 1993 figures are those reported by Financial Management Services, Department of Treasury; FY 1994 and beyond are budget data from the respective agencies cited.

15. Challenge by the European Union (EU) Members of the General Agreement on Tariff and Trade (GATT). In 1992, the EU members of GATT requested a formal "consultation" concerning the appropriateness of the HMF within the context of GATT. Issues included the *ad valorem* nature of the fee, the nature of the expenditures made on behalf of commercial navigation, and verification that the domestic sector of the U.S. economy also was paying the fee. Of special concern was the growing surplus of the HMTF. The Assistant Secretary of the Army (Civil Works) sent a representative to Geneva who, with a legal advisor from the Office of the U.S. Trade Representative, addressed these issues with the EU members of GATT. Additional consultations have not been requested, but at an April 1995 Department of Transportation meeting with the Consultative Shipping Group (consisting of West European shipping nations, the EU, and Japan), concern was again expressed about the growing surplus in the HMTF. The European Union representative made it clear that the EU has been monitoring carefully the HMTF.

16. Conclusions. The HMTF is meeting its objective of financing 100 percent of the eligible O&M expenditures made on behalf of commercial navigation for the St. Lawrence Seaway Development Corporation and the Army Corps of Engineers. With the $4 million funding for improved administration and enforcement of the HMF, improvements in collections can be anticipated, particularly in the domestic and export sectors. Passage of enabling legislation for NOAA would reduce the projected surplus now accumulating in the HMTF in a manner consistent with

the objectives of the Fund. The growing surplus in the HMTF remains. This can only be corrected by widening the authorized uses for HMTF monies, or by reducing the HMF to a level consistent with its annual expenditures.

Supreme Court, U.S.
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No. 97-372

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES SHOE CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether application of the Harbor Maintenance Tax (26 U.S.C. 4461(a)) to goods loaded at ports of the United States for export shipment violates the Export Clause of the Constitution.

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-45a) is reported at 114 F.3d 1564. The decision of the United States Court of International Trade (Pet. App. 46a-89a) is reported at 907 F. Supp. 408.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1997. The petition for a writ of certiorari was filed on August 29, 1997, and was granted on October 31, 1997 (118 S. Ct. 361). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article I, Section 9, Clause 5 of the Constitution provides:

> No Tax or Duty shall be laid on Articles exported from any State.

2. 26 U.S.C. 4461 provides:

> (a) General rule.—There is hereby imposed a tax on any port use.
>
> (b) Amount of tax.—The amount of the tax imposed by subsection (a) on any port use shall be an amount equal to 0.125 percent of the value of the commercial cargo involved.
>
> (c) Liability and time of imposition of tax.—
>
> (1) Liability.—The tax imposed by subsection (a) shall be paid by—
>
> (A) in the case of cargo entering the United States, the importer,
>
> (B) in the case of cargo to be exported from the United States, the exporter, or
>
> (C) in any other case, the shipper.
>
> (2) Time of imposition.—Except as provided by regulations, the tax imposed by subsection (a) shall be imposed—
>
> (A) in the case of cargo to be exported from the United States, at the time of loading, and

> (B) in any other case, at the time of unloading.

3. 26 U.S.C. 4462 provides, in relevant part:

> (a) Definitions.—For purposes of this subchapter—
>
> (1) Port Use.—The term "port use" means—
>
> (A) the loading of commercial cargo on, or
>
> (B) the unloading of commercial cargo from,
>
> a commercial vessel at a port.
>
> (2) Port.—
>
> (A) In general.—The term "port" means any channel or harbor (or component thereof) in the United States, which—
>
> (i) is not an inland waterway, and
>
> (ii) is open to public navigation.
>
> * * * * *
>
> (3) Commercial cargo.—
>
> (A) In general.—The term "commercial cargo" means any cargo transported on a commercial vessel, including passengers transported for compensation or hire.
>
> (B) Certain items not included.—The term "commercial cargo" does not include—

(i) bunker fuel, ship's stores, sea stores, or the legitimate equipment necessary to the operation of a vessel, or

(ii) fish or other aquatic animal life caught and not previously landed on shore.

STATEMENT

Approximately 4000 cases have been filed in the United States Court of International Trade to challenge the constitutionality of the Harbor Maintenance Tax, 26 U.S.C. 4461. More than 100 similar challenges to the tax are pending in the Court of Federal Claims. The present case was selected by the Court of International Trade as a test case for this litigation. The other similar suits have been held in abeyance pending the final disposition of this case.

1. The Harbor Maintenance Tax imposes a port use charge of 0.125 percent of the value of any commercial cargo that is loaded or unloaded from a commercial vessel in any port of the United States. 26 U.S.C. 4461(a). The tax applies without differentiation as to the origin or destination of the cargo. The incidence of the tax is simply upon "any port use" (*ibid.*).

The Harbor Maintenance Tax was enacted as part of the Water Resources Development Act of 1986, Pub. L. No. 99-662, 100 Stat. 4082, which was the first legislation in over a decade to authorize the development of new harbor facilities. See S. Rep. No. 126, 99th Cong., 1st Sess. 3-4 (1985); H.R. Rep. No. 251, 99th Cong., 1st Sess., Pt. 4, at 17 (1985); *User Fees for Ports and Waterways: Hearing Before the Senate*

Comm. on Finance, 99th Cong., 1st Sess. 16-20 (1985) (*Senate Hearing*). Prior to passage of the Act, port development projects in the United States had lagged behind those of other developed countries. Concern had been expressed that our deteriorating waterways contributed to the severe trade imbalance that then existed. H.R. Rep. No. 251, *supra*, Pt. 4, at 17; *Senate Hearing*, *supra*, at 20. In order to overcome objections to federal funding for harbor and port projects, the Harbor Maintenance Tax was adopted to ensure that such projects were funded by user fees rather than from general funds. See, *e.g.*, H.R. Rep. No. 251, *supra*, Pt. 4, at 23-24, 41, 42; *Senate Hearing*, *supra*, at 2, 6, 9, 19, 23-24; 132 Cong. Rec. 4921-4923 (1986) (Sen. Abdnor); *id.* at 4937-4938 (Sen. Moynihan); *id.* at 4940 (Sen. Stafford); *id.* at 4958-4959 (Sen. Bentsen).[1]

The Harbor Maintenance Tax provides funds for the necessary costs of maintaining and expanding channel and harbor facilities by "impos[ing] Federal user fees or charges on the beneficiaries of these expenditures." S. Rep. No. 228, 99th Cong., 1st Sess. 5 (1985). Because the United States "has an obvious interest in making those who specifically benefit from its services pay the cost" (*Massachusetts* v. *United States*, 435 U.S. 444, 462 (1978)), Congress determined to impose a nationally uniform fee on the "value of the cargo passing" through harbors (S. Rep.

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[1] During the hearings on this legislation, the Administration abandoned its opposition to federal funding of new water projects only upon the understanding that the costs for such projects would be paid by user fees rather than from general funds. *Senate Hearing*, *supra*, at 23.

No. 126, *supra*, at 9). The Senate Report on the Act explains that (S. Rep. No. 228, *supra*, at 5-6):

> [T]he ad valorem basis of the charges is the only acceptable basis on which to impose such charges. This national, uniform basis minimizes any possible competitive disadvantage among cargo types and U.S. ports which otherwise might result from user charges.

The Harbor Maintenance Tax is collected from the importer, exporter or other shipper whose cargo is loaded or unloaded in a port of the United States. 26 U.S.C. 4461(c)(1), (2). The charges thus collected are deposited in the Harbor Maintenance Trust Fund (26 U.S.C. 9505) and "may only be expended for harbor operations and maintenance" costs incurred on the shippers' behalf (Pet. App. 45a (Mayer, J., dissenting)). See 26 U.S.C. 9505(c).[2] The trustee of the Fund is required to invest the monies "in interest-bearing obligations of the United States." 26 U.S.C. 9602(b)(1). The interest earned on the bonds is paid to the Trust and is not retained in the general revenue accounts of the United States. 26 U.S.C. 9505(a)(3); 26 U.S.C. 9602(b)(3). The purpose of the Fund is to ensure that

[2] The Harbor Maintenance Tax was originally established at 0.040 percent of value. Pub. L. No. 99-662, § 4461, 100 Stat. 4266. In the Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 11214, 104 Stat. 1388-436, it was increased to its current level of 0.125 percent. Before the rate of this port use charge was increased, the Harbor Maintenance Trust Fund provided approximately 40 percent of the necessary funds for the operation and maintenance of eligible channels and harbors. Pub. L. No. 99-662, § 210, 100 Stat. 4106. Since 1991, the Trust Fund has provided approximately 100 percent of those funds. Water Resources Development Act of 1990, Pub. L. No. 101-640, § 316, 104 Stat. 4641. See also note 8, *infra*.

the commercial users who are the principal beneficiaries of the costs incurred in developing and maintaining channels and harbors—rather than the general taxpaying public—pay the costs of these facilities. S. Rep. No. 126, *supra*, at 9.

The Harbor Maintenance Tax is collected by the United States Customs Service. Importers remit payments to the Customs Service along with payments of customs duties. Exporters and domestic shippers, who pay no duties, remit the tax to the Customs Service on a quarterly basis pursuant to 19 C.F.R. 24.24. The monies collected by the Customs Service are then transferred to the Harbor Maintenance Trust Fund pursuant to 26 U.S.C. 9505(b).

2. Respondent loads goods for shipment as exports in ports of the United States and, along with importers and domestic shippers, is therefore subject to the Harbor Maintenance Tax. After making several payments of this port use charge, respondent commenced this refund suit in the United States Court of International Trade. Respondent claimed that application of the Harbor Maintenance Tax to cargo loaded in a port of the United States for export violates the Export Clause of the Constitution, which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State." U.S. Const. Art. I, § 9, Cl. 5.

The Court of International Trade agreed with respondent that the Harbor Maintenance Tax imposes a prohibited tax on exports (Pet. App. 46a-89a).[3] The

[3] In enacting the Harbor Maintenance Tax, Congress specified that, "[f]or purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. 4462(f)(2); see 26 U.S.C. 4462(f)(1). The Senate Report explained that "the Court

court rejected the government's contention that this statutory fee for "any port use" (26 U.S.C. 4461(a)) is a permissible charge for the use of port facilities. The court stated that "there is little indication that Congress intended to establish a user fee" (Pet. App. 56a) and that the "primary purpose of the [Harbor Maintenance] Tax is to raise revenue" (*id.* at 57a). The court reasoned that "little nexus binds the imposition of the *ad valorem* tax on cargo to the costs of port maintenance" and that the "fees collected * * * yield funds for the purpose of maintaining and developing American ports and harbors for all uses, commercial and recreational" (*id.* at 58a). The court concluded that Congress impermissibly imposed a

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of International Trade is to have primary jurisdiction for actions involving the port user charge provisions." S. Rep. No. 228, *supra*, at 10. Respondent seeks a refund of payments for which it made a timely administrative protest with the Customs Service pursuant to the provisions applicable to customs duties (19 U.S.C. 1514, 1515). The government acknowledged that the Court of International Trade has jurisdiction in this case, for respondent's claim "contest[s] the denial of a protest" (28 U.S.C. 1581(a)). The Court of International Trade held, however, that, regardless of any protest, the court would have jurisdiction under 28 U.S.C. 1581(i) because respondent's claim was filed in that court within two years after the tax was paid. See Pet. App. 75a-76a; 28 U.S.C. 2636(i). That holding was affirmed by the Federal Circuit. Pet. App. 15a.

We have not sought review of that holding. Whether the jurisdiction of the court rests upon 28 U.S.C. 1581(a)—because respondent seeks review of a denial of a protest—or upon 28 U.S.C. 1581(i)—because this suit was commenced within two years of payment—has no relevance to the proper disposition of this case. That issue is of relevance only for other claimants, who have challenged the Harbor Maintenance Tax without first filing an administrative protest.

constitutionally proscribed "duty under the pretext of fixing a fee" (*id.* at 57a, quoting *Pace* v. *Burgess*, 92 U.S. 372, 376 (1876)).

The court assumed, without deciding, that the statutory fee for "any port use" imposed by the Harbor Maintenance Tax (26 U.S.C. 4461(a)) does not discriminate against exports. The court nonetheless concluded that, as applied to goods loaded for export, the tax violates the Export Clause because it is not fairly related to "the cost of the benefits port users receive from harbor maintenance and development projects" (Pet. App. 60a). The court stated that the port use fee imposed by the Harbor Maintenance Tax has yielded revenues "in excess of costs incurred" in operating and maintaining port facilities and that these funds may be "used to fund projects yet to be commenced, or even envisioned" (*ibid.*). The court reasoned that the charge is therefore "excessive in relation to the cost to the government" of providing port facilities (*ibid.*).

3. a. The Federal Circuit has exclusive jurisdiction over appeals from decisions of the Court of International Trade. 28 U.S.C. 1295(a)(5). Sitting as a five-judge panel in this case, the court of appeals affirmed the decision of the court below (Pet. App. 1a-30a), with one judge dissenting (*id.* at 31a-45a). The court held that the port use fee imposed by the Harbor Maintenance Tax is unconstitutional as applied to goods loaded for export from the ports of the United States.

The court of appeals noted that, under this Court's decisions in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), and *Massachusetts* v. *United States*, 435 U.S. 444 (1978), a government fee exacted in connection

with the provision of services may constitutionally be applied to goods for export if the fee (i) does not discriminate against exporters, (ii) is based upon a fair approximation of use and (iii) is not excessive in relation to the costs incurred by the government in providing the services (Pet. App. 17a). Without addressing the first and third prongs of this test, the court concluded that the Harbor Maintenance Tax is unconstitutional as applied to goods for export because "there is no correlation between the amount of [the tax] an exporter pays and the amount the exporter uses the port" (*ibid.*).

The court of appeals gave three reasons for its conclusion. First, the court noted that the tax is imposed on and collected from the party who ships the goods rather than on "the ship owners" who are the "direct users" of the ports and harbors (Pet. App. 19a). Second, the court stated that, because the statutory port use fee is assessed on the *value* of goods being shipped, it lacks any reasonable connection with the cost or value of the benefits provided from use of the port (*id.* at 21a-22a). Third, the court found it objectionable that "exporters are forced to pay for harbor maintenance across the entire country, even though they receive no benefit from maintained harbors at any port other than the one they actually use" (*id.* at 22a).

The court rejected the government's contention that a fee based solely upon the use of a port is not a tax on an "[a]rticle of export" within the meaning of the Export Clause. The court reasoned that the fee falls on the goods, and not on the use of the port, because it "is imposed on an *ad valorem* basis at the time the exported goods are loaded on the vessel" and

the "exporter, rather than the manufacturer, pays the tax" (Pet. App. 24a).

The court also rejected the government's contention that the Harbor Maintenance Tax is not a proscribed tax on exports because it constitutes a valid exercise of the power of Congress to regulate interstate and foreign commerce. The court concluded that the statutory fee on "port use" is not a regulation of commerce because the fee "regulates nothing" (Pet. App. 27a). The court stated that the Harbor Maintenance Tax does not regulate commerce because "[i]t is not designed to reduce the overall use of the ports" and because "the government has not persuaded us that the [tax] is designed to simply recoup the costs of the services" provided to users of ports and harbors (*ibid.*).

b. Judge Mayer dissented. He noted that a user fee differs from a tax because "a tax is enacted to raise revenue 'to go to the general support of the government,' see *Head Money Cases*, 112 U.S. 580, 596 (1884), while a user fee is designed as a specific charge for the use of government facilities and services" (Pet. App. 32a). Based upon the text and the extensive legislative history of the statute, Judge Mayer concluded that the Harbor Maintenance Tax is a constitutionally valid fee for the use of harbor facilities that satisfies all three prongs of the test established by this Court in *Massachusetts* v. *United States*, 435 U.S. at 464, 466-470.

First, Judge Mayer disagreed with the majority's conclusion that a fee assessed equally against exporters and all other shippers for the use of the ports of the United States is constitutionally infirm because the parties who must pay the fee are not the "direct beneficiaries" of the services that the

government provides. He noted that this conclusion is illogical as a matter of economics and also "flies in the face of Congress' finding that exporters are the direct beneficiaries" of port services (Pet. App. 42a). Because the ultimate burden of any fee imposed on "port use" is allocated by economics, not by statute, Judge Mayer emphasized that "it is unimportant whether the fee be assessed against exporters and importers, the ultimate beneficiaries of the harbor maintenance and operations projects, or against the actual vessel owner, to be passed on to the importers or exporters if it chooses" (*ibid.*).

Judge Mayer also rejected the majority's conclusion that the Harbor Maintenance Tax is not fairly related to the costs incurred by the government in providing and maintaining port facilities (Pet. App. 39a-45a). It was expressly to avoid discrimination among ports and port users that Congress chose to allocate the costs of providing these services under a nationally uniform charge based upon the value of goods shipped (*id.* at 39a). Judge Mayer concluded that the Constitution does not require Congress to calculate the port use fee separately for each port, because "[e]very exporter has all ports and harbors available to it" (*id.* at 40a).

SUMMARY OF ARGUMENT

The Harbor Maintenance Tax is a constitutionally permissible fee on the use of the ports of the United States. This Court has consistently held that "revenue measures that operate only to compensate a government for benefits supplied" are not proscribed by the Export Clause of the Constitution, for the government "has an obvious interest in making those

who specifically benefit from its services pay the cost." *Massachusetts* v. *United States*, 435 U.S. 444, 462 (1978).

The Harbor Maintenance Tax requires those who specifically benefit from use of the Nation's ports to bear the costs of such facilities. The fee is imposed without discrimination upon exporters, importers and domestic shippers who use ports of the United States. The fees collected under the Harbor Maintenance Tax are deposited in the Harbor Maintenance Trust Fund and may be withdrawn from that Fund only for the designated purposes of maintaining and operating port facilities. As a fee that exacts "compensation * * * for services properly rendered," it is "in no sense a duty on exportation" and is "not an infringment of the constitutional provision" (*Pace* v. *Burgess*, 92 U.S. 372, 375-376 (1876)).

ARGUMENT

THE HARBOR MAINTENANCE TAX DOES NOT VIOLATE THE EXPORT CLAUSE OF THE CONSTITUTION

This Court has long recognized the distinction between an unconstitutional "Tax or Duty * * * laid on Articles exported" (U.S. Const. Art. I, § 9, Cl. 5) and a permissible user fee that exacts "compensation * * * for services properly rendered." *Fairbank* v. *United States*, 181 U.S. 283, 304 (1901), quoting *Pace* v. *Burgess*, 92 U.S. 372, 375 (1876). "[R]evenue measures that operate only to compensate a government for benefits supplied" are not constitutionally proscribed, for the government "has an obvious interest in making those who specifically benefit from

its services pay the cost" (*Massachusetts* v. *United States*, 435 U.S. 444, 462 (1978)).[4]

1. In determining whether a charge imposed on the use of commercial facilities provided by the government constitutes a "tax" within the proscription of the Export Clause or a permissible charge for "services properly rendered," the initial inquiry is whether the primary purpose of the charge is to earn revenue: "The point to guard against is, the imposition of a duty under the pretext of fixing a fee." *Pace* v. *Burgess*, 92 U.S. at 376. See also *Fairbank* v. *United States*, 181 U.S. at 304; *Moon* v. *Freeman*, 379 F.2d 382, 391 (9th Cir. 1967). In distinguishing between taxes and user fees, courts look to "the revenue's ultimate use, asking whether it provides a general benefit to the public * * * or whether it provides more narrow benefits to regulated companies or defrays the agency's cost of regulation." *Hager* v. *City of West Peoria*, 84 F.3d 865, 870 (7th Cir. 1996), quoting *San Juan Cellular Tel. Co.* v. *Public Serv. Comm'n of Puerto Rico*, 967 F.2d 683, 685 (1st Cir. 1992).

[4] The court of appeals did not dispute that Congress may properly exercise its power under the Commerce Clause to "recoup the costs of the services" provided to users of ports and harbors (Pet. App. 27a). A burden upon exports imposed pursuant to a valid exercise of Congress's power to regulate commerce does not violate the Export Clause. *Armour Packing Co.* v. *United States*, 209 U.S. 56, 78-80 (1908). The powers to tax and to regulate commerce are independent sources of legislative authority. See *Richfield Oil Corp.* v. *State Bd. of Equalization*, 329 U.S. 69, 75, 76 (1946); *Board of Trustees of Univ. of Illinois* v. *United States*, 289 U.S. 48, 58 (1933). The Export Clause "does not condemn or invalidate charges or taxes * * * merely because they affect exportation indirectly or remotely." *William E. Peck & Co.* v. *Lowe*, 247 U.S. 165, 174 (1918). See also *Barclay & Co.* v. *Edwards*, 267 U.S. 442, 447 (1924); *National Paper & Type Co.* v. *Bowers*, 266 U.S. 373, 377 (1924); *Turpin* v. *Burgess*, 117 U.S. 504, 505 (1886).

Enhancement of the general revenue is plainly not an overt or disguised purpose of the Harbor Maintenance Tax.[5] This statutory fee on "any port use" (26 U.S.C. 4461(a)) was enacted as part of a comprehensive legislative program providing for the operation and development of harbor and port facilities throughout the Nation. As Judge Mayer noted in dissent in this case (Pet. App. 32a-33a), Congress expressly contemplated that the charges imposed by the Harbor Maintenance Tax represent a user fee, rather than a "tax," in the constitutional sense. See, *e.g.*, S. Rep. No. 228, 99th Cong., 1st Sess. 5 (1985) ("the committee amendment imposes new port user charges"). In imposing this fee on the commercial use of ports of the United States, Congress

[5] In construing the Export Clause, the Court has emphasized that "we must regard things rather than names." *Fairbank* v. *United States*, 181 U.S. at 304. See *Cooley* v. *Port of Philadelphia*, 53 U.S. (12 How.) 299, 313 (1852) ("certainly it is the thing, and not the name, which is to be considered"); *Brock* v. *Washington Metropolitan Area Transit Auth.*, 796 F.2d 481, 489 (D.C. Cir. 1986), cert. denied, 481 U.S. 1013 (1987). The fact that a fee is labeled a "tax" or is placed in the Internal Revenue Code is irrelevant to the question whether the assessment and collection of the fee violates the Export Clause of the Constitution. See, *e.g.*, *Head Money Cases*, 112 U.S. 580, 596 (1884) ("[T]he act is not void because, within a loose and more extended sense than was used in the Constitution, it is called a tax."); *Pace* v. *Burgess*, 92 U.S. at 375 (disregarding the label "tax" in concluding that a stamp tax was a permissible fee and not an impermissible tax on exports within the meaning of the Export Clause).

explained that "[t]he taxes and fees in this legislation are not for the purpose of raising revenue. Rather, they are to repay costs related directly to the servicing of commerce. These fees and taxes offset services rendered to vessels." S. Rep. No. 126, 99th Cong., 1st Sess. 7 (1985).

Consistent with this clear statement of legislative purpose, the fees collected under this statute are deposited in the specially designated Harbor Maintenance Trust Fund, from which they may be expended only for port and harbor maintenance. 26 U.S.C. 9505(c). The funds in this Trust may not be used to support the general welfare. See *Massachusetts* v. *United States*, 435 U.S. at 448; Pet. App. 36a (Mayer, J., dissenting) ("The government has been true to this constraint.").[6] The monies in the Harbor Maintenance Trust Fund are invested in "interest-bearing obligations of the United States." 26 U.S.C. 9602(b)(1). Interest earned on the bonds is paid directly to the Trust Fund and is not retained by

[6] The placement of the Harbor Maintenance Tax and the Harbor Maintenance Trust Fund in the Internal Revenue Code is consistent with other, similar legislation in which Congress has assessed use-related charges to fund specific federal projects that benefit particular users of federal services. H.R. Rep. No. 251, 99th Cong., 1st Sess., Pt. 3, at 11-13 (1985). See, *e.g.*, 26 U.S.C. 9502 (Airport and Airway Trust Fund), 9503 (Highway Trust Fund), 9504 (Aquatic Resources Trust Fund), 9506 (Inland Waterways Trust Fund), 9511 (National Recreational Trails Trust Fund). In rejecting a constitutional challenge to the federal aviation use fee in *Massachusetts* v. *United States*, 435 U.S. at 448, the Court emphasized that the Airway Trust Fund was created "[t]o assure that the revenues from these user taxes would be expended only for the expansion, improvement and maintenance of the air transportation system * * * ."

the United States. 26 U.S.C. 9505(a)(3); 26 U.S.C. 9602(b)(3). "This is not a situation where the Government has appropriated all, or most, of the award to itself and labeled the booty as a user fee." *United States* v. *Sperry Corp.*, 493 U.S. 52, 62 (1989).[7]

The fact that this Trust Fund currently enjoys a positive balance does not mean, as the courts below erroneously concluded (Pet. App. 57a-58a), that the Harbor Maintenance Tax is a disguised and proscribed "tax" rather than a valid "fee" for services. See *South Carolina* v. *Block*, 717 F.2d 874, 887 (4th Cir. 1983), cert. denied, 465 U.S. 1080 (1984). The precise level of funding required each year for the development, maintenance, and operation of harbor resources obviously fluctuates over time. Realizing that costs usually cannot be projected with certainty, Congress was careful "to allow for *not more than 100 percent* of the eligible operation and maintenance costs assigned to commercial navigation of all harbors and inland harbors within the United States to be appropriated from the navigation trust fund." H.R. Conf. Rep. No. 966, 101st Cong., 2d Sess. 59 (1990) (emphasis added). As this Court explained in *Massachusetts* v. *United States*, 435 U.S. at 470 n.25, in rejecting the same contention adopted by the court of appeals in this case:

> Even if the revenues in any one year exceeded the outlays, it would not follow that the tax is

[7] In upholding challenged user fees, courts have frequently emphasized that the revenues from the fee were deposited in a dedicated trust fund and were applied only to cover the costs of government facilities and services. See, *e.g.*, *Morgan's Steamship Co.* v. *Louisiana Bd. of Health*, 118 U.S. 455, 461 (1886); *Head Money Cases*, 112 U.S. at 596.

> invalid as applied. * * * [T]he validity of the tax [is] determined by comparing total revenue with total outlays: *i.e.*, a surplus of revenue over outlays in any one year can be offset against actual deficits of past years and perhaps against projected deficits of future years.

See also *Alamo Rent-A-Car, Inc.* v. *Sarasota-Manatee Airport Auth.*, 906 F.2d 516, 522 (11th Cir. 1990) ("given the long term nature of maintaining and developing an airport, it was appropriate * * * to factor in future development plans when setting user fees"), cert. denied, 498 U.S. 1120 (1991).[8]

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[8] For the most recent year reflected in the record, the Harbor Maintenance Trust Fund had a year-end surplus ($452 million) that was smaller than the expenditures from the Fund for that year ($497 million). J.A. 104. The emphasis of the court of appeals on whether a "surplus" exists in the Fund is misplaced, for this is not a case in which a "surplus" is paid into the general revenues of the United States. Instead, as the dissenting judge emphasized, the relevant fact is that the monies placed in the Fund may be used *only* for navigation projects (Pet. App. 36a-37a).

The Secretary of the Army has reported to Congress that the Harbor Maintenance Tax is "meeting its objectives of financing 100 percent of the eligible [operating and maintenance] expenditures made on behalf of commercial navigation for the St. Lawrence Seaway Development Corporation and the Army Corps of Engineers." J.A. 109. The Secretary suggested that Congress could address the "growing surplus" of the Fund either by reducing the rate of the Harbor Maintenance Tax or by adding to the navigation projects funded with its revenues. J.A. 109-110. See note 2, *supra*. By contrast, the decision of the court of appeals in this case would effectively abolish the Trust Fund for, by voiding the Harbor Maintenance Tax in its entirety, it would cause the entire balance of the Fund to be fully expended in less than one year.

The decision of the court of appeals thus seriously misapplies this Court's precedents in concluding that the charges imposed by the Harbor Maintenance Tax represent an unconstitutional "duty" masquerading as a "fee." As the dissent instead correctly emphasizes (Pet. App. 36a-37a), the relevant fact is that the fees may not be expended *at any time* for any purpose other than the operation and maintenance of harbor and port facilities for commercial navigation. See 26 U.S.C. 9505(c); H.R. Rep. No. 881, 101st Cong., 2d Sess. 288 (1990); note 6, *supra*. The Export Clause does not proscribe "revenue measures that operate only to compensate a government for benefits supplied" (*Massachusetts* v. *United States*, 435 U.S. at 462). Charges for "services that do not hamper, but indeed, aid" commerce are not proscribed as "taxes" on articles exported. *New Orleans Steamship Ass'n* v. *Plaquemines Port, Harbor & Terminal Dist.*, 690 F. Supp. 1515, 1522 (E.D. La. 1988), aff'd, 874 F.2d 1018 (5th Cir. 1989), cert. denied, 495 U.S. 932 (1990).

The Harbor Maintenance Tax was enacted to provide funds "for operations and maintenance of U.S. channels and harbors (ports) in order to improve and maintain such ports for waterborne commerce." S. Rep. No. 228, *supra*, at 5. Congress concluded that "[s]uch additional investment in U.S. ports will facilitate economic development and make the Nation's water transportation system more efficient." *Ibid.* The Harbor Maintenance Tax was enacted to ensure that those who benefit from such facilities bear the costs of their operation and maintenance. As a fee that exacts "compensation * * * for services properly rendered," the Harbor Maintenance Tax is "in no sense a duty on exportation" and does not "infringe[] * * * the

constitutional provision" (*Pace* v. *Burgess*, 92 U.S. at 375-376).

2. The decisions of this Court establish that a user fee does not constitute a proscribed "tax" if the fee (i) does "not discriminate against" a constitutionally protected interest, (ii) is "based upon some fair approximation of use" and (iii) is "not shown to be excessive in relation to the cost to the government of the benefits conferred." *Massachusetts* v. *United States*, 435 U.S. at 464. See also *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707, 716-720 (1972). When, as in the present case, the statute was enacted with a "specific declaration by Congress that the [fees collected] are intended to reimburse costs incurred by the United States, the burden must lie with [the plaintiff] to demonstrate that" the fee, in reality, is impermissibly designed to raise general revenues. *United States* v. *Sperry Corp.*, 493 U.S. at 60.[9]

The court of appeals did not conclude that the Harbor Maintenance Tax discriminates against exports. Nor did the court conclude that the fee imposed by the statute is excessive in relation to the costs of

[9] As this Court explained in *Fairbank* v. *United States*, 181 U.S. at 285:

> The constitutionality of an act of Congress is a matter always requiring the most careful consideration. The presumptions are in favor of constitutionality, and before a court is justified in holding that the legislative power has been exercised beyond the limits granted, or in conflict with restrictions imposed by the fundamental law, the excess or conflict should be clear.

Respondent thus bears a heavy burden in seeking to establish that the Act violates the Constitution. See *Brown* v. *Maryland*, 25 U.S. (12 Wheat.) 419, 436 (1827).

the benefits conferred (Pet. App. 17a).[10] Instead, the court concluded that the statutory fee is unconstitutional because it is not based upon some "fair approximation of use" of the ports of the United States (*id.* at 23a). Each of the three rationales offered by the court of appeals in support of its conclusion is incorrect and conflicts with the decisions of this Court.

a. The court of appeals stated that the statutory fee is not based upon some "fair approximation of use" because it is imposed on exporters and other parties who ship goods rather than on "the ship owners" who are the "direct users" of the Nation's ports and harbors (Pet. App. 18a, 19a). The court of appeals provided no citations of authority to support this proposition, however, and no such authority exists.[11]

[10] The Harbor Maintenance Tax clearly satisfies these two prongs of the test used by this Court in determining whether the exaction is a permissible user fee. The statutory fee applies to all importers, exporters and domestic shippers (26 U.S.C. 4461(c)) and thus does not discriminate against exporters. And, for the reasons described above (see notes 2 & 8, *supra*), the fees collected are not excessive in relation to the expenditures made by the government. Although the Trust Fund currently enjoys a positive balance, that fact does not affect the constitutionality of the fee. See, *e.g.*, *Massachusetts* v. *United States*, 435 U.S. at 470 n.25; Pet. App. 44a (Mayer, J., dissenting). For example, in *New Hampshire Motor Transport Ass'n* v. *Flynn*, 751 F.2d 43, 47 (1st Cir. 1984), the court upheld a user fee even though the monies collected were to be used to fund projects not yet commenced rather than to repay the government for past services rendered.

[11] Respondent argued in the court of appeals that only a "direct beneficiary" of a government program may be subjected to a fee for the costs of that program. Respondent claimed that such a rule was established in *National Cable Television Ass'n* v. *United States*, 415 U.S. 336 (1974). That

Indeed, this Court has expressly rejected the very rationale on which the court of appeals relied. In *United States* v. *Sperry Corp.*, 493 U.S. at 60, quoting *Massachusetts* v. *United States*, 435 U.S. at 463 n.19, the Court explained that it

> has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services. * * * All that we have required is that the user fee be a "fair approximation of the cost of benefits supplied."

In upholding a government fee imposed on the use of airport facilities in *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. at 714 (emphasis supplied), the Court emphasized that it is "not * * * particularly important whether the charge is imposed on the passenger himself, to be collected by the airline, or on the airline, to be passed on to the passenger if it chooses. *In either case, it is the act of enplanement and the consequent use of runways and other airport facilities that give rise to the obligation.*"

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decision, however, concerned whether a particular agency fee had been authorized by a particular statute. See *id.* at 342-344. The Court "recognized that it was not announcing universal definitions of 'tax' and 'fee' " but was "simply determining the meaning of these terms in a particular context quite different from that presented in" cases involving the limitations on taxing authority under the Export and Import-Export Clauses. *Union Pac. R.R.* v. *Public Utility Comm'n*, 899 F.2d 854, 861 (9th Cir. 1990). See also *San Juan Cellular Tel. Co.* v. *Public Serv. Comm'n of Puerto Rico*, 967 F.2d at 686; *Maine* v. *Department of Navy*, 973 F.2d 1007, 1014 (1st Cir. 1992); *Florida Power & Light Co.* v. *United States*, 846 F.2d 765 (D.C. Cir. 1988), cert. denied, 490 U.S. 1045 (1989).

Here, as in *Evansville*, it is the use of government-provided "facilities that give[s] rise to the obligation" to pay the fee. As Judge Mayer correctly concluded in dissent in this case, because the ultimate burden of any fee imposed on "port use" is allocated by economics, not by statutes, "it is unimportant whether the fee be assessed against exporters and importers, the ultimate beneficiaries of the harbor maintenance and operations projects, or against the actual vessel owner, to be passed on to the importers or exporters if it chooses" (Pet. App. 42a). The court of appeals improperly ignored the holding of this Court in *Evansville* in reaching its erroneous decision in this case.

The court of appeals similarly erred in ignoring the determination of Congress that it is the exporters and other shippers, and not "the ship owners" (Pet. App. 19a), who are the "direct beneficiar[ies]" of port maintenance services. Congress enacted the Harbor Maintenance Tax to avoid the harsh consequences that inadequate and deteriorating ports and harbors would have for commercial shippers. S. Rep. No. 126, *supra*, at 8. The fee on "port use" was designed specifically to provide funding to enhance the facilities available for transporting the goods of commercial shippers. In assessing the port use fee against the shippers who use these facilities, Congress rationally concluded that "a portion of Federal expenditures needed for port operations and maintenance should be borne by the direct beneficiaries of such expenditures." S. Rep. No. 228, *supra*, at 5.[12] The court of

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[12] Congress noted that "[t]he provision of a new, deeper channel is as much a service rendered to the shipper as pilotage, dockage, or wharfage." S. Rep. No. 126, *supra*, at 7.

appeals lacked any plausible basis for rejecting the determination of Congress that shippers are the "direct beneficiaries of such expenditures" (*ibid.*).[13]

b. The court of appeals also erred in holding that the statutory fee on port use is not based upon a "fair approximation of use" because it is assessed on the *value* of goods being shipped rather than on tonnage or some other factor (Pet. App. 21a-22a). That holding conflicts with numerous decisions of this Court, including decisions in which this Court has expressly approved use fees based upon the value of goods being shipped. See *United States* v. *Sperry Corp.*, 493 U.S. at 60.

"This Court has never held that the amount of a user fee must be precisely calibrated to the use that a party makes of Government services." *United States* v. *Sperry Corp.*, 493 U.S. at 60. Recognizing that, "when the Federal Government applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system," the Court has specifically "declined to impose a requirement that the Government 'give weight to every factor affecting appropriate compensation.'" *Id.* at 61, quoting *Massachusetts* v. *United States*, 435 U.S. at 468.

For example, flat registration fees that do not vary based upon the amount of use have been sustained if that fee recovers a "fair approximation" of the costs of the benefits supplied. *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. at 716-717. Fees for the use of transportation resources based upon the "fair market value" of the vehicle or upon the gross revenues of the transportation service have also been sustained. See *id.* at 715-716; *Alamo Rent-A-Car, Inc.* v. *Sarasota-Manatee Airport Auth.*, 906 F.2d at 516.

Mileage or tonnage is not a necessary factor in calculation of a transportation use fee. As the Court emphasized in rejecting the challenge to the flat registration fee assessed in *Massachusetts* v. *United States*, 435 U.S. at 463, quoting *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542, 545 (1950), the validity of a use fee "should be judged by its result, not its formula, and must stand unless proven to be unreasonable in amount for the privilege granted." Accord *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. at 716. Even though "[c]omplete fairness" would require that the use fee be calibrated based upon "every factor affecting appropriate compensation" for the government services provided, "[t]hese factors * * * are so

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[13] Congress considered imposing the port use fee on vessel operators, rather than shippers, but concluded that this was not feasible because the fee is imposed on the value of the goods and operators generally have little or no knowledge or documentation concerning the value of the cargo they carry. See, *e.g.*, *User Fees for Ports and Waterways: Hearing Before the Senate Comm. on Finance*, 99th Cong., 1st Sess. 91 (1985) (*Senate Hearing*) (statement of President, American Waterways Operators, Inc.). Shippers are the best source of this information and "already have to file declarations with the U.S. government regarding imports and exports." *Id.* at 104-105 (statement of Marc J. Fink on behalf of 28 ocean common carriers of freight). Based on the information gathered in the detailed legislative hearings, Congress reasonably determined that shippers are the direct beneficiaries of the program and the proper source of the information needed to assess the fee. Respondent has shown no basis for doubting the obvious fact that *if* the fee had instead been imposed on vessel operators the costs would have been passed along to the shippers in any event.

countless that we must be content with 'rough approximation rather than precision.'" *Capitol Greyhound Lines* v. *Brice*, 339 U.S. at 546, quoting *International Harvester Co.* v. *Evatt*, 329 U.S. 416, 422-423 (1947).

The statutory fee for port use satisfies the requirement that it not "be unreasonable in amount for the privilege granted." The funds obtained through collection of the fee recover the cost incurred in providing port services (see notes 2 & 8, *supra*), and the fee is imposed on the parties whose goods are enhanced in value by these services. A recovery of a portion of the value of the benefits conferred—from those who receive that value—is not "unreasonable in amount for the privilege granted." In holding to the contrary in this case, the court of appeals failed to adhere to this Court's consistent admonition that the validity of the fee is to be "judged by its results, not its formula."

The Court has often emphasized that perfection in the allocation of cost among those who benefit is not required. For more than a century, the Court has recognized that "[p]erfect uniformity and perfect equality of taxation, in all the aspects in which the human mind can view it, is a baseless dream." *Head Money Cases*, 112 U.S. 580, 595 (1884). It is "the amount of the tax, not its formula, that is of central concern." *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. at 716-717. In *United States* v. *Sperry Corp.*, 493 U.S. at 60, for example, the Court upheld a federal fee imposed for use of the Iran Claims Tribunal that was based soley on the value of the recovery. In upholding that *ad valorem* fee, the Court specifically rejected the notion "that the amount of a user fee must be

precisely calibrated to the use that a party makes of Government services." *Ibid.* It is thus now "beyond dispute that an ad valorem charge can be a user fee" (Pet. App. 41a (Mayer, J., dissenting), citing, *e.g.*, *United States* v. *Sperry Corp.*, 493 U.S. at 59-64; *Alamo Rent-A-Car, Inc.* v. *City of Palm Springs*, 955 F.2d 30 (9th Cir. 1992)).

Congress reasonably concluded that an *ad valorem* fee is appropriate in the present context as well. Such a formula reasonably charges the cost of port operations to those who benefit from actual use of the ports. Moreover, allocating cost based upon the value of goods being shipped substantially reduces administrative cost and burdens.[14] Congress was aware that the Customs Service "has a strong presence at ports of entry and is experienced at appraising imported merchandise." S. Rep. No. 228, *supra*, at 10. Because the core information collected by the Customs Service concerns the value of the cargo, structuring the Harbor Maintenance Tax on an *ad valorem* basis reduces administrative cost by utilizing the existing data collection system.

Extensive testimony was presented to Congress favoring such an *ad valorem* fee over a port-specific fee or a flat tonnage fee. See, *e.g.*, *Senate Hearing*, *supra*, at 47; *Water Resources Conservation, Development, and Infrastructure Improvement Act of 1985: Hearing Before the House Comm. on Ways*

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[14] The Court noted in *Massachusetts* v. *United States*, 435 U.S. at 466, that, "[i]f the National Government were required more precisely to calibrate the amount of the fee to the extent of the actual use of the airways, administrative costs would increase and so would the amount of revenue needed to operate the system."

and Means, 99th Cong., 1st Sess. 59 (1985) (*House Hearing*). Shippers of low-value cargo testified that any fee for port use that was calculated upon tonnage would "disproportionately * * * affect bulk cargo marketability when compared to [its] impact on containerized cargo. It also would disadvantage export dependent ports in contrast to import dependent ports." *Senate Hearing*, *supra*, at 19; see *House Hearing*, *supra*, at 59. In imposing the statutory fee on an *ad valorem* basis, Congress rationally concluded that shippers of higher value cargo would receive greater benefits (*e.g.*, greater profits) from the enhancement of port facilities and that value is therefore "the only acceptable basis on which to impose such charges. This national, uniform basis minimizes any possible competitive disadvantages among cargo types and U.S. ports which otherwise might result from user charges." S. Rep. No. 228, *supra*, at 5-6.

In overruling the method of "fair approximation" that Congress reasonably elected to employ in imposing this fee for port use, the court of appeals thus disregarded not only the decisions of this Court but also the clear legislative record. In particular, the court failed to follow the well-established rule, summarized by this Court in *Fairbank* v. *United States*, 181 U.S. at 304, quoting *Pace* v. *Burgess*, 92 U.S. at 375-376, that

> proper fees * * * are in no sense a duty on exportation. They are simply the compensation given for services properly rendered. The rule by which they are estimated may be an arbitrary one; but an arbitrary rule may be more convenient and less onerous than any other which

> can be adopted. * * * [H]aving due regard to that latitude of discretion which the legislature is entitled to exercise in the selection of the means for attaining a constitutional object, we cannot say that the charge imposed is excessive or that it amounts to an infringement of the constitutional provision * * * .

c. The court of appeals further erred in concluding that the statutory port use fee is objectionable because "exporters are forced to pay for harbor maintenance across the entire country, even though they receive no benefit from maintained harbors at any port other than the one they actually use" (Pet. App. 22a). The court's reasoning would evidently require Congress to establish separate fees and trust funds for each port. But this Court rejected an identical contention in sustaining a federal fee for airport services in *Massachusetts* v. *United States*, 435 U.S. at 468. The Court explained that, even though a user may actually land or take off from only a limited number of facilities, charging a nationally uniform fee that contributes to a national fund for airport services is permissible because nationwide "services are available for their use if needed and * * * the provision of the services makes the airways safer for all users." *Ibid.* See also *Maine* v. *Department of Navy*, 973 F.2d at 1013-1015 (upholding a state fee as a "fair approximation" of the use of state services when the parties benefit from the availability of the services as well as from any actual use). The decision of the court of appeals in this case conflicts with this settled rule.

3. Respondent ultimately acknowledges that Congress *could* have adopted a permissible user fee for

port facilities. Respondent contends only that such a fee should be based upon tonnage or other factors that respondent thinks might more closely relate the costs to be recovered to the benefits conferred (Br. in Opp. 20).[15] As Judge Mayer emphasized in dissent (Pet. App. 39a), however, Congress rationally determined that an *ad valorem* fee is "the only acceptable basis on which to impose such charges" for port services (S. Rep. No. 228, *supra*, at 5-6). In rejecting that determination, the court of appeals failed to honor the wide "latitude of discretion which the legislature is entitled to exercise in the selection of the" method for calculating a fee. *Fairbank* v. *United States*, 181 U.S. at 304.

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[15] Respondent states that Congress could enact "a *bona fide* user fee to replace" the Harbor Maintenance Tax and that "[t]here are many ways by which this could be done" (Br. in Opp. 20).

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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No. 97-372

In The

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,
Petitioner,

v.

UNITED STATES SHOE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether application of the *ad valorem* Harbor Maintenance Tax (26 U.S.C. § 4461(a)) to goods loaded at ports of the United States for export shipment violates the Export Clause of the Constitution.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 LISTING

On May 23, 1995, the assets of the Footwear Division of Respondent United States Shoe Corporation were acquired by Nine West Group Inc. Nine West Group Inc. is a publicly traded company. There are no parent companies and no nonwholly owned subsidiaries other than as set forth herein.

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In The

Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-372

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES SHOE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the provisions set forth in the Government's brief, the following statutory provisions are also relevant and reproduced in the appendix to this brief: Harbor Maintenance Tax, 26 U.S.C. § 4462(f)(1)-(2); Harbor Maintenance Trust

Fund, 26 U.S.C. § 9505; Management of Trust Funds, 26 U.S.C. § 9602(b)(1); Harbor Development and Navigation Improvement Act of 1986, 33 U.S.C. § 2236(a)(1)-(4).

STATEMENT

1. This action challenges the Harbor Maintenance Tax ("HMT") as applied under § 4461 of the Internal Revenue Code (26 U.S.C. § 4461) to merchandise exported from the United States. The Export Clause of the U.S. Constitution provides that "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const. art. I, § 9, cl. 5. The United States Court of International Trade ("CIT") held the HMT unconstitutional as applied to exports, and the United States Court of Appeals for the Federal Circuit affirmed, relying in substantial part on this Court's recent decision in *United States v. International Business Machines Corp.*, 116 S. Ct. 1793 (1996) (hereinafter "*IBM*").

The HMT is described in the statute as a "tax on any port use" and is a part of the Internal Revenue Code. 26 U.S.C. § 4461(a). The term "port use" is defined as the loading or unloading of commercial cargo on or from a commercial vessel at a port. 26 U.S.C. § 4462(a)(1). As applied to exports, the HMT is (1) paid by the exporter (26 U.S.C. § 4461(c)(1)(B)); (2) assessed as a percentage (currently 0.125%) of the value of the exported merchandise (26 U.S.C. § 4461(b)); and (3) imposed at the time the goods are loaded on the vessel for export (26 U.S.C. § 4461(c)(2)).

HMT payments are received by the United States Customs Service and deposited into the United States Treasury. Pet. App. 70a, citing United States General Accounting Office, *U.S. Customs Service: Limitations in Collecting Harbor Maintenance Fees*, GAO/GGD-92-25, at 5 (Dec. 1991); J.A. 82-83. An equivalent amount is then appropriated from the Treasury to the Harbor Maintenance Trust Fund ("Trust Fund"), from which expenditures may be made if further authorized by Congress. 26 U.S.C. § 9505.

The Trust Fund has run a yearly surplus since its inception. Pet. App. 51a, citing *Second Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund For Fiscal Year 1993* at 5 (1994); J.A. 68-69.[1] The cumulative surplus was $865 million as of fiscal year 1996 and is projected to reach nearly $3 billion as of fiscal year 2001. *Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Years 1995 and 1996* at 7 (1997) ("*1995-96 Annual Report*"). *See also* Pet. App. 88a-89a (referring to surplus as of 1994).

HMT revenues are included in federal budget calculations. As the CIT observed:

> The practice of listing trust fund revenues on budget permits them to be included in calculations of the federal budget deficit. Thus, any monies contributed by such funds to the budget decreases the Treasury's need to borrow in order to finance the federal deficit.

Pet. App. 51a, citing H.R. Rep. No. 251 pt. III, 99th Cong., 1st Sess. 19 (1985). The Trust Fund surplus is invested in interest-bearing obligations of the United States. 26 U.S.C. § 9602(b)(1).

2. Respondent United States Shoe Corporation filed suit in the CIT for a refund of HMT paid in connection with its exports for the quarter ending June 30, 1994. A three-judge panel unanimously held that the HMT, as applied to exports, is unconstitutional under the Export Clause. A five-judge

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[1] The President is required to transmit annually to Congress a report on the status of the Trust Fund. Pub. L. No. 102-580, § 330, 106 Stat. 4797, 4851 (1992).

panel of the Court of Appeals for the Federal Circuit affirmed the CIT's judgment, with one judge dissenting.[2]

In holding that the HMT is an unconstitutional tax on exports, the CIT stated (Pet. App. 66a-67a):

> Congress imposed the Tax directly upon exports well along the stream of exportation. The Tax is assessed at the time of loading the cargo. 26 U.S.C. § 4461(c)(2). As a tax imposed upon delivery of cargo to a carrier violates the Export Clause, *see A.G. Spalding* [*v. Edwards*, 262 U.S. 66, 68-70 (1923)], a tax imposed on the further step of loading such cargo onto the vessel also falls within the prohibition of the Clause.
>
> The Tax is assessed *ad valorem* directly upon the value of the cargo itself, not upon any services rendered for the cargo, or upon any instruments of commerce that accompany the goods. Further, an *ad valorem* tax is levied in direct proportion to an article's value. Congress could not have imposed the Tax any closer to exportation, or more immediate to the articles exported.

The CIT found that the HMT is not a user fee under a three-prong test derived from *Massachusetts v. United States*, 435 U.S. 444 (1978), and *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972).[3] Under that test, in order to constitute a user fee rather than a tax, (1) the charge must not discriminate against the constitutionally-protected interest; (2) the implementing authority must base the charge upon a fair approximation of the use of the facility at issue; and (3) the charge must not be excessive in relation to the cost to the government of the benefits conferred. *Massachusetts*, 435 U.S. at 464-70. The CIT found that the HMT fails both the second and third prongs. Pet. App. 60a.

The CIT concluded that the HMT is not based upon a fair approximation of use because: (1) exporters and importers of low-value bulk cargo use port facilities to a much greater extent than exporters and importers of high-value non-bulk cargo, yet the former bear lower HMT costs than the latter; (2) most large ports paying the majority of HMT costs receive no more than 30% back in maintenance expenditures; and (3) although only certain commercial users must pay the tax, they are not the sole users of the ports nor the only beneficiaries of maintenance and development projects.[4] Pet. App. 60a.

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[2] Both courts below unanimously held that the CIT had jurisdiction under 28 U.S.C. § 1581(i). The Government acknowledges that the CIT properly exercised jurisdiction (U.S. Br. 7-8 n.3), but its explanation of the CIT's jurisdiction is inaccurate. The court of appeals confirmed that the CIT had subject matter jurisdiction under § 1581(i), the court's residual jurisdiction provision, rather than under 28 U.S.C. § 1581(a), which applies to actions challenging the Customs Service's denial of a protest, as the statutory prerequisite for a valid protest — a "decision" of the Customs Service — does not exist in the HMT context. Thus, the court found U.S. Shoe's filing of a protective protest to be irrelevant.

[3] *Massachusetts* involved a challenge to an assessment as violative of the judicially-implied intergovernmental tax immunity doctrine, while *Evansville* involved a challenge to a charge under the Commerce Clause. This Court has not previously addressed whether the *Massachusetts/Evansville* standard is relevant to the Export Clause, and the court of appeals acknowledged that a stricter standard might well be appropriate. *See* Pet. App. 19a-20a.

[4] Many "port users" are exempt from the HMT. The statute contains exemptions for intraport movements of cargo, port use by the U.S. Government, humanitarian and development assistance cargo, shipments of fish or other aquatic animals not previously landed on shore, bunker fuel, ship's stores, and any cargo shipped between the continental United States and Alaska, Hawaii, or any U.S. possession (with the exception of crude oil transported from Alaska). 26 U.S.C. § 4462.

With respect to the third prong under *Massachusetts*, the CIT recognized not only that the HMT is "on budget," thereby permitting HMT revenues to be included in calculations of the federal deficit (Pet. App. 51a), but also found that the HMT is excessive in relation to the cost to the government, as it is used to fund projects yet to be commenced or even envisioned (rather than to repay the government for services rendered), and has produced a continually expanding surplus that is used to offset general federal deficits. Pet. App. 60a.

3. Relying in substantial part on this Court's recent decision in *IBM*, the court of appeals affirmed the CIT's holding that the HMT is unconstitutional as a tax or duty on exported articles. The court noted (Pet. App. 24a):

> Here, the HMT is imposed on an *ad valorem* basis at the time the exported goods are loaded on the vessel, rather than at some prior point in time when the goods are not yet bound for export. The exporter, rather than the manufacturer, pays the tax. In the absence of the export act of loading the goods, and in the absence of the exporter's documents required for that act, the HMT would not be owed and no amount could be determined because the HMT is incurred at the time of loading, 26 U.S.C. § 4461(c)(2)(A), and is based on the value of the goods as determined by the standard commercial export documentation, 26 U.S.C. § 4462(a)(5)(A). *See also* 19 C.F.R. § 24.24(e)(2)(i).

The court of appeals also upheld the CIT's determination that the HMT is not a user fee under *Massachusetts* because it is not based on a fair approximation of use. Pet. App. 23a. The court of appeals distinguished cases relied on by the Government in which *ad valorem* fees were upheld, *United States v. Sperry Corp.*, 493 U.S. 52 (1989), and *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991). The

court noted that exporters are not assured harbor maintenance at the harbor where their goods are loaded, and that the HMT, as imposed on exports, is paid by indirect users of the harbors — exporters, rather than the direct users — the ship owners. Pet. App. 19a-21a. The court further observed that because *Sperry* involved a suit under the Just Compensation Clause, the standard for upholding the assessment in that case was less restrictive than the standard that applies under the Commerce Clause. The court of appeals noted that "per *IBM*, the Export Clause is still more restrictive." Pet. App. 19a-20a.

Finally, the court of appeals rejected the Government's contention that "fair approximation of use" refers to "the value of the benefits received" as opposed to "the costs of the benefits received." The court noted: (1) the *Massachusetts* case itself suggests that the value of the benefits is not the appropriate measure; (2) higher value merchandise does not always correlate to a higher profit margin; (3) exporters are forced to pay for harbor maintenance nationwide even though they receive no benefits from harbors other than the one they use; and (4) the HMT does not pay for services such as police, fire or rescue units, which provide benefits to exporters by keeping harbors safe whether the exporters use those services or not. Pet. App. 21a-22a. Accordingly, the court of appeals rejected the Government's contention that the HMT as applied to exports is a valid user fee and outside the scope of the Export Clause.[5]

SUMMARY OF ARGUMENT

The Export Clause is broad and unqualified: "No Tax or duty shall be laid on Articles exported from any State." The Clause was one of the important compromises that made possible the adoption of the Constitution, and the Court has

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[5] Judge Mayer, alone of the eight lower court judges to consider the HMT, dissented.

consistently interpreted the Clause in accordance with its expansive language. As the Court recently reaffirmed: "The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.'" *United States v. International Business Machines Corp.*, 116 S. Ct. 1793, 1797 (1996), quoting *Fairbank v. United States*, 181 U.S. 283, 290 (1901).

The Government contends that there is a broad user fee exception to the Export Clause, but no Export Clause precedents support that view. The principal precedents on which the Government relies, *Massachusetts v. United States*, 435 U.S. 444 (1978), and *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), are inapplicable in the Export Clause context. *Evansville* considered whether a nondiscriminatory State levy was consistent with the Commerce Clause, while *Massachusetts* considered whether a nondiscriminatory charge violated an implied State immunity from federal taxation. As confirmed in *IBM*, the cases construing such implied constraints have little if any relevance in applying the express textual prohibition of the Export Clause. 116 S. Ct. at 1798-99.

Accordingly, any exception to the Export Clause for a charge asserted to be a "user fee" rather than a "tax or duty" should be narrowly drawn, limited to a charge that very closely relates to use of government services and that is no greater than necessary to compensate the government for the tendered services. As the lower courts correctly found, the HMT utterly fails to meet even the Government's far broader proposal for a user fee exception, and under a standard more consistent with Export Clause precedents the HMT is manifestly an improper "tax or duty" on exports.

Most significantly, the HMT is assessed *ad valorem*, in direct proportion to the value of export cargo. The Court has consistently recognized that an *ad valorem* tax on exports is precisely what the Framers intended to preclude by the Export Clause. *See e.g.*, *Fairbank*, 181 U.S. at 291; *A.G. Spalding*

& Bros. v. Edwards, 262 U.S. 66 (1923). While the Government characterizes the HMT as a fee for "port use," the HMT applies without regard to the size of the vessel, the manner or extent of use of harbor maintenance services, or any attributes of the port. Functionally, the assessment is imposed directly on export commerce and is indistinguishable from a traditional tax or customs duty.

The fact that Congress created a trust fund for HMT revenues is of little or no practical significance. First, harbor maintenance and development are traditional governmental functions, long funded from general tax revenues and serving broad national interests. The HMT simply replaced one form of "tax" with another in funding these governmental functions. Further, HMT receipts are "on budget" and thereby offset congressional deficit calculations in determining discretionary spending available for other governmental programs. The ever-growing Trust Fund surplus, which stood at $865 million as of fiscal year 1996 and is projected to grow to nearly $3 billion as of fiscal year 2001, operates to free up funds elsewhere in the budget, and in addition is recycled back into the general Treasury by investments in government obligations.

The Government's characterization of the HMT as a "user fee" rather than a "tax or duty" was thus correctly rejected by the lower courts, even under the lenient *Evansville/Massachusetts* standard urged by the Government. The HMT is not closely, or even remotely, related to an exporter's use of federal harbor maintenance services, and the amounts collected substantially exceed the government's harbor maintenance costs on a nationwide basis. The HMT, in both form and substance, is a "tax or duty" on exports and thus within the express prohibition of the Export Clause.

ARGUMENT

I. THE EXPORT CLAUSE BROADLY PROHIBITS FEDERAL REVENUE MEASURES APPLIED TO EXPORT COMMERCE. ANY USER FEE EXCEPTION SHOULD BE NARROWLY LIMITED.

A. The Export Clause's Prohibition Is Expansive.

The Export Clause states: "No Tax or Duty shall be laid on Articles exported from any State." Art. I, § 9, cl. 5. Succinct and straightforward, the Clause was nevertheless among the most actively debated at the 1787 Constitutional Convention. Some delegates declared emphatically that a broad export exemption was necessary to gain their support for a federal taxation power,[6] or for the Constitution itself.[7] Others opposed an unqualified ban, arguing that exports should not be "exempt from all contributions for the public service."[8] The opponents offered a variety of proposals to limit the exemption: one to allow export duties upon two-thirds vote of Congress, another to apply the exemption only to certain products, another to limit the ban to a fixed period of time, and another to prohibit export taxes only "for the purpose of revenue."[9] But a majority rejected these

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[6] Madison's *Notes of Debates in the Federal Convention*, reproduced in 2 Max Farrand, *The Records of the Federal Convention of 1787* 305-06 (rev. ed. 1966) ("*Records*") (statement of George Mason of Virginia).

[7] *Id.* at 95 (statement of General Pinckney of South Carolina), 360 (statement of Hugh Williamson of North Carolina), 360 (statement of Pierce Butler of South Carolina: "strenuously opposed to a power over exports; as unjust and alarming to the staple States").

[8] *Id.* at 223 (statement of Gouverneur Morris of New York).

[9] *Id.* at 359-63.

proposals, and the Convention instead removed exports entirely from the federal government's powers of taxation.[10]

This Court has repeatedly recognized the unqualified nature of the Export Clause and the importance that the Framers attached to it. In the seminal Export Clause case *Fairbank v. United States*, 181 U.S. 283 (1901), the Court stated:

> [T]he purpose of the restriction is that *exportation — all exportation — shall be free from national burden*. This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose of revenue," but the motion was voted down. So it is clear that the framers of the Constitution intended, not merely that exports should not be made a source of revenue to the national government, but that *the national government should put nothing in the way of burden upon such exports*.

181 U.S. at 292-93 (emphasis added). The Court thus held in *Fairbank* that the Export Clause should be given a broad rather than narrow construction:

> [I]f the Constitution in its grant of powers is to be so construed that Congress shall be able to carry into full effect the powers granted, it is equally imperative that where prohibition or limitation is placed upon the power

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[10] *See* 2 *Records* at 220 ("the hands of the Legislature were absolutely tied. . . — exports could not be taxed") (statement of Rufus King of Massachusetts); 2 Joseph Story, *Commentaries on the Constitution of the United States* § 1011, at 470 (1833) (by virtue of the Export Clause, "[t]he power is, therefore, wholly taken away to intermeddle with the subject of exports"). *See also IBM*, 116 S. Ct. at 1803 ("there is substantial evidence from the Debates that proponents of the [Export] Clause fully intended the breadth of scope that is evident in the language").

> of Congress *that prohibition or limitation should be enforced in its spirit and to its entirety*. . . . The true spirit of constitutional interpretation in both directions [grants of powers, and limitations on powers] is to give *full, liberal construction* of the language, aiming ever to show fidelity to the spirit and purpose.

181 U.S. at 289 (emphasis added).

Much more recently, in *IBM*, a case which the Government's brief remarkably fails even to mention, the Court affirmed the continuing vitality of the Export Clause and the fact that it "strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation." 116 S. Ct. at 1797. The Court quoted from *Fairbank* as follows:

> The requirement of the Constitution is that exports should be free from any governmental burden. The language is "no tax or duty." Whether such provision is or is not wise is a question of policy with which the courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress . . . .

IBM, 116 S. Ct. at 1797, quoting *Fairbank*, 181 U.S. at 290.

Consistent with this recognition of the importance and breadth of the Export Clause, the Court has repeatedly rejected efforts to dilute its protection of export commerce. In *Fairbank* itself, the Court observed that "free exportation . . . was one of the purposes of the Constitution" (181 U.S. at 291) and thus struck down a stamp tax imposed on foreign bills of lading. Such a tax was in substance and effect a tax on the export articles and, therefore, impermissible. Likewise, in *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915), the Court invalidated a tax on marine insurance policies as applied to export commerce, even

though the tax applied indiscriminately to domestic and import commerce as well.[11] And in *United States v. Hvoslef*, 237 U.S. 1, 13 (1915), the Court ruled that the Export Clause "is designed to give immunity from taxation to property that is in the actual course of exportation" and thus struck down a federal tax on charter parties to the extent it applied to charters for export shipments.[12]

Similarly, in *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66 (1923), the Court unanimously ruled that "[a]rticles in course of [export] transportation cannot be taxed" (*id.* at 69), and thus invalidated a federal sales tax on sporting equipment when applied to sales made as a part of the export process. Application of the tax to export sales would deny the "liberal protection" to which exports were constitutionally entitled. *Id.* at 70.

To be sure, the Court has invoked the Export Clause only where a federal revenue measure applies to goods in the process of exportation or to the export process itself. Thus, a manufacturing tax is not prohibited even though some of the goods being manufactured are intended ultimately for export. Because the activity subject to the tax (manufacturing) precedes the export process, the Export Clause is not

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[11] *Thames & Mersey* was reaffirmed in *IBM*.

[12] The *Fairbank*/*Hvoslef*/*Thames & Mersey* line of cases was aptly summarized in *Willcuts* v. *Bunn*, 282 U.S. 216, 228 (1931):

> [W]ith respect to federal taxation of articles exported from any State, the constitutional inhibition gives immunity to the process of exportation and to the transactions and documents embraced in that process. Only on that construction can the constitutional safeguard be maintained.

(Citations omitted).

implicated.[13] Similarly, because an income tax applies to net income based on all of a taxpayer's revenues and costs, and is calculated well after the export process is finished, the Export Clause does not apply even though the taxpayer engages in export commerce.[14] However, as the Court stated most recently in *IBM*, "the Export Clause strictly prohibits any tax or duty, discriminatory or not, that falls on exports during the course of exportation." 116 S. Ct. at 1797. The Clause thus "disallows *any* attempt to raise federal revenue from exports." *Id.* at 1802 (emphasis added). The HMT, even more directly than the tax at issue in *IBM*, is a tax on exports and the export process. There, as here,

> [t]he Government's policy argument [for extracting revenues from exports] cannot be squared with the broad language of the Clause. The better reading, that adopted by our earlier cases, is that the Framers sought to alleviate their concerns by *completely* denying to Congress the power to tax exports *at all*.

Id. at 1803 (emphasis added).

B. There Is No Support for a User Fee Exception Which Would Allow Imposition of an *Ad Valorem* Tax on Exports.

The Government's brief suggests that the Court has adopted a user fee exception to the Export Clause under *Massachusetts v. United States*, 435 U.S. 444 (1978), and *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), and has routinely allowed

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[13] *Cornell v. Coyne*, 192 U.S. 418 (1904); *Turpin v. Burgess*, 117 U.S. 504 (1886).

[14] *William E. Peck & Co. v. Lowe*, 247 U.S. 165 (1918). *See also Barclay & Co. v. Edwards*, 267 U.S. 442 (1924); *National Paper & Type Co. v. Bowers*, 266 U.S. 373 (1924).

governmental levies on exports under such an exception. *See, e.g.*, U.S. Br. 13-14, 19 ("The Export Clause does not proscribe 'revenue measures that operate only to compensate a government for benefits supplied,'" quoting *Massachusetts v. United States*). But, not surprisingly in light of the "broad language of the Clause" (*IBM*, 116 S. Ct. at 1803) and the fact that the Framers "fully intended the breadth of scope that is evident in the language" (*id.* at 1803), the reality is very different. There is no Export Clause precedent for the approach urged by the Government; to the contrary, precedents require that any exception to the Export Clause for a charge asserted to be a "user fee" rather than a "tax or duty" be very narrowly drawn.

1. Only once has the Court concluded that a charge on exports fell outside the Export Clause, and it did so in narrow circumstances and solely for the purpose of ensuring that the exports would be exempt from taxation. The Act of July 20, 1868, 15 Stat. 157, *repealed* Aug. 8, 1882, 22 Stat. 372, imposed an excise tax on manufactured tobacco but allowed an exemption for tobacco that was to be exported. To prevent abuse of this export exemption, the law required that a stamp be affixed at the factory to tobacco intended for export, and a small charge was imposed for the stamp.[15] In *Pace v. Burgess*, 92 U.S. 372 (1876), the Court concluded that this charge, intended to prevent fraud and to ensure the availability of a tax exemption for legitimate exports, was not prohibited by the Export Clause:

> The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer

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[15] The charge was initially 25 cents per package, later reduced to 10 cents. The manufacturer could package export shipments in as large a package as it wished, and thus the stamp fee "bore no proportion whatever to the quantity or value of the package on which it was affixed." *Pace v. Burgess*, 92 U.S. at 375.

desired to export, *and thereby, instead of taxing it, to relieve it from the taxation to which other tobacco was subjected*. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked. . . .

[The fee for the export stamp reflected] the expense of those arrangements which were *necessary in order to give to the exporter the benefit of exemption from taxation*, and at the same time to secure the necessary precautions against the perpetration of fraud. We know how next to impossible it is to prevent fraudulent practices wherever the internal revenue is concerned; and the pretext of intending to export such an article as manufactured tobacco would open the widest door to such practices, if the greatest strictness and precaution were not observed. The proper fees accruing in the due administration of the laws and regulations necessary to be observed to protect the government from imposition and fraud likely to be committed under pretence of exportation are in no sense a duty on exportation. They are simply the compensation given for services properly rendered.

Id. at 375 (emphasis added).[16]

Thus, the Court held that the stamp requirement for exports was not a tax or duty. Reasoning that "we must regard things rather than names," the Court found that the stamp was used "for quite a different purpose from that of imposing a tax or duty: indeed, *it is used for the very contrary*

[16] The Government selectively quotes from this passage to convey the impression that there is a broad Export Clause exception for "proper fees." U.S. Br. 28-29. Significantly, however, the Government omits critical language which makes clear that the fees being addressed had the very limited purpose discussed above and were "in no sense a duty on exportation." 92 U.S. at 375. The HMT is not remotely similar in nature or effect.

purpose, — that of securing exemption from a tax or duty." *Id.* at 376 (emphasis added).[17]

Thus, the only direct precedent for an exception to the Export Clause is for a limited government fee, not related to the value of the export and designed solely to cover the government's administrative expenses in ensuring that exports *would be exempt* from otherwise applicable taxes. Obviously, the HMT does not fall within the scope of such an exception.[18]

[17] When the same stamp fee was again challenged a few years later, the Court reiterated this holding without further comment but added an alternative ground — that the fee was applied at the factory before the commencement of the export process. *Turpin v. Burgess*, 117 U.S. 504 (1886).

[18] While never addressed expressly by this Court, some lower courts have suggested that there is an additional exception to the Export Clause: for regulatory programs adopted under the Commerce Clause that have only a minor and incidental revenue impact for exporters. *E.g.*, *Moon v. Freeman*, 379 F.2d 382 (9th Cir. 1967) (a $168 monetary imposition arising from farmer's noncompliance with regulatory program under the Agricultural Adjustment Act did not violate the Export Clause); *but see* Note, *Constitutionality of Export Controls*, 76 *Yale L.J.* 200 (1966) (questioning the constitutionality of such measures). Indeed, there is a hint in the Government's brief (p. 14 n.4) that perhaps the HMT could be upheld on this ground. However, the court of appeals correctly rejected this claim in light of the obvious revenue-raising objectives of the HMT and the lack of any regulatory aspect of the tax. Pet. App. 25a-29a. After all, "[t]he text of the Export Clause . . . expressly prohibits Congress from laying any tax or duty on exports," and general Commerce Clause jurisprudence cannot override that express prohibition. *IBM*, 116 S. Ct. at 1799. *See also North American Co. v. SEC*, 327 U.S. 686, 704-05 (1946) (congressional power under the Commerce Clause "is limited by express provisions in other parts of the Constitution such as § 9 of Article I"); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 196 (1824) (commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, *other than are prescribed in the constitution*") (emphasis added).

2. Lacking any favorable Export Clause precedents, the Government relies on decisions from other areas of law and urges adoption of a standard from *Evansville* and *Massachusetts* to define a user fee exception for the Export Clause. Both lower courts agreed that the HMT failed to meet even the *Evansville/Massachusetts* standard, and the court of appeals recognized that the Export Clause might well require a narrower standard. Pet. App. 19a-20a. Indeed, it is clear that the doctrinal analysis that underlies *Evansville* and *Massachusetts* is wholly inapplicable in the Export Clause context.

Evansville involved a New Hampshire levy for airport maintenance that the State applied to both intrastate and interstate commerce. The Court rejected the taxpayer's claim that the State tax was an impermissible restraint on interstate commerce under the Commerce Clause. Even though *Evansville* (decided in 1972) predated *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977),[19] the Court by then had already moved well towards the view that States could impose nondiscriminatory taxes on interstate commerce, notwithstanding the negative implications of the dormant Commerce Clause.[20] This consideration pervades the analysis in *Evansville*, and precedents construing the implied constraints of the Commerce Clause obviously have little value

[19] *Complete Auto Transit* gave the States enhanced freedom to tax interstate commerce by overruling a series of cases that had held it *per se* unconstitutional for States to impose "privilege of doing business" taxes on multi-state businesses. *See IBM*, 116 S. Ct. at 1798.

[20] *E.g.*, *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938) ("It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business.").

in applying the express and unqualified constraints of the Export Clause. This Court so held in *IBM*:

> Our decades-long struggle over the meaning of the non-textual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the textual command of the Export Clause is equally fluid. At one time, the Court may have thought that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, but the text did not require that view. The text of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports.

116 S. Ct. at 1799 (footnote omitted).[21]

The Government's other principal precedent, *Massachusetts v. United States*, is likewise far afield from the Export Clause. It involved a claim by Massachusetts that a federal registration fee for civil aircraft, as applied to State-owned aircraft, violated an implied State immunity from federal taxes. Drawing on decisions in the "analogous" context of the Commerce Clause (435 U.S. at 454 & 462), the Court upheld the fee. The Court observed that "[t]he purpose of the implied constitutional restriction on the national taxing power is not to give an advantage to the States . . . but rather is solely to protect the States from undue interference with

[21] The Government's heavy reliance on the user fee discussion in *United States v. Sperry Corp.*, 493 U.S. 52, 60-62 (1989) (*see* U.S. Br. 17, 20, 22, 24-27) is even more extreme than its reliance on Commerce Clause cases. *Sperry* dealt with the Just Compensation Clause, and as the court of appeals noted below (Pet. App. 19a-20a), *Sperry* held that, in the respect relevant there, the Commerce Clause imposes constraints on government that are greater than those of the Just Compensation Clause. 493 U.S. at 61 n.7. Given that the Export Clause is more restrictive than the Commerce Clause, it follows that Just Compensation Clause cases have little, if any, relevance here.

their traditional governmental functions." *Id.* at 459. Given that the aircraft registration fee was nondiscriminatory and "fell far short" of compensating the federal government for its assistance to civil aviation (*id.* at 469), the State's objection was rejected. "Where the subject of tax is a natural and traditional source of federal revenue and where it is inconceivable that such a revenue measure could ever operate to preclude traditional state activities, the tax is valid." *Id.* at 459-60.

Massachusetts cited no Export Clause precedents, and by its nature the decision's analysis has scant relevance to that clause. Exports are not "a natural and traditional source of federal revenue" (*Massachusetts*, 435 U.S. at 459-60); to the contrary, the Export Clause requires the opposite conclusion. Moreover, the nondiscrimination factor that was a central element of the analysis in *Massachusetts* (as well as in *Evansville*) is no comfort to the Government under the Export Clause. In *IBM*, *Thames & Mersey*, and *Hvoslef*, the Court has consistently held that discrimination *vel non* is an irrelevant factor under the Export Clause so long as a revenue measure is applied to export commerce.[22]

The Government should not be permitted to accomplish through the back door (*i.e.*, an unduly narrow definition of "tax or duty") what the Court has said it cannot accomplish

[22] In addition to relying on Commerce Clause decisions, the *Massachusetts* Court referenced as analogous the Duty of Tonnage Clause (art. I, § 10, cl. 3), citing *Clyde Mallory Lines v. Alabama*, 296 U.S. 261 (1935). *Clyde Mallory* upheld a $7.50 per vessel fee that the Port of Mobile imposed for harbor policing, on the ground that a reasonable charge for traditional harbor services rendered to a vessel such as pilotage, wharfage, or medical inspection was not a "duty of tonnage" under the Tonnage Clause. Even in the context of this relatively innocuous flat per-vessel fee that was imposed on a harbor-specific basis, the Court observed: "It is unnecessary to consider other types of port charges, as for dredging or other forms of harbor improvement, with respect to which different considerations may apply." 296 U.S. at 267.

through the front door (extending the Court's Commerce Clause jurisprudence to the Export Clause). *Massachusetts* and *Evansville* were simply considering what types of nondiscriminatory levies (whether denominated "tax," "fee," or — as *Massachusetts* used on one occasion — "user tax"; 435 U.S. at 464) were consistent with Commerce Clause and implied governmental immunities jurisprudence. The Export Clause calls for a stricter standard.

3. While relying on Commerce Clause and implied tax immunity cases, the Government's brief shies away from the one constitutional provision that expressly adopts a user fee exception — the Import-Export Clause. Art. I, § 10, cl. 2. That clause prohibits (absent congressional consent) State "Imposts or Duties on Imports or Exports, *except what may be absolutely necessary for executing its inspection Laws* . . . ." (emphasis added). Charges for State inspection services are a form of user fee, "paid for service[s] performed" (*Brown v. Maryland*, 25 U.S. (12 Wheat.) 419, 438 (1827)), that were authorized by the Framers so that the States could recover their "incidental duties necessary for the inspection & safe-keeping of their produce."[23]

Twice the Court has observed that this express exception for inspection fees in the Import-Export Clause is strong evidence against implying exceptions for other State imposts or duties. As Chief Justice Marshall observed in *Brown v. Maryland*:

> If it be a rule of interpretation to which all assent, that the exception of a particular thing from general words, proves that, in the opinion of the law-giver, the thing excepted would be within the general clause had the exception not been made, we know no reason why this general rule should not be as applicable to the constitution

[23] 2 *Records* 588 (statement of George Mason).

> as to other instruments. If it be applicable, then *this exception in favour of duties for the support of inspection laws, goes far in proving that the framers of the constitution classed taxes of a similar character with those imposed for the purpose of inspection*, with duties on imports and exports, and *supposed them to be prohibited*.

25 U.S. at 438 (emphasis added). The same observation was made in *Richfield Oil Corp. v. State Bd. of Equalization*, 329 U.S. 69, 76 (1946):

> Only one exception is created [in the Import-Export Clause] — "except what may be absolutely necessary for executing its inspection Laws." The fact of a single exception suggests that no other qualification of the absolute prohibition was intended.

Thus, while States have not been wholly precluded from charging vessels for the use of State services,[24] the courts have kept a watchful eye on such State measures.[25]

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[24] *See, e.g., Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299 (1851) (local ports may charge for pilotage services).

[25] *See, e.g., James B. Beam Distilling Co. v. Department of Revenue*, 367 S.W.2d 267 (Ky. 1963), *aff'd*, 377 U.S. 341, 343 (1964) (inspection-law exception unavailable where State relied on federal inspectors); *Phipps & Phipps v. Cleveland Refining Co.*, 261 U.S. 449 (1923) (State inspection fees in excess of actual inspection costs struck down as improper tax); *Western Oil & Gas Ass'n v. Cory*, 726 F.2d 1340 (9th Cir. 1984) (California's method for collecting "rent" for vessels passing over state-owned tidelands and submerged lands, based on volume of oil in interstate and foreign commerce passing over leased properties, violated Commerce and Import-Export Clauses), *aff'd per curiam by an equally divided Court*, 471 U.S. 81 (1985).

Of course, because the Import-Export Clause does not prohibit nondiscriminatory State taxes, the States may, through such taxes, receive compensation for the governmental services they supply to exporters as

The Import-Export Clause contains a second express exception: a State may impose *any* duty on imports or exports *provided that Congress consents*. Art. I, § 10, cl. 2 ("No State shall, without the Consent of the Congress, . . ."). Notably, in the Harbor Development and Navigation Improvement Act of 1986, which was enacted as part of the same legislative package as the HMT, Congress specifically invoked this authority under the Import-Export Clause to consent to a narrowly defined category of State and local fees that could be imposed for harbor maintenance. 33 U.S.C. § 2236(a). The Export Clause contains no comparable authority for Congress to impose federal fees for such purposes.

* * * *

In sum, the Framers intended the Export Clause to be broad and unqualified, exempting export commerce from any federal "tax or duty." The exemption should be broadly construed (*Fairbank*, 181 U.S. at 289) and "disallows *any* attempt to raise federal revenue from exports" (*IBM*, 116 S. Ct. at 1802; emphasis added). If a user fee exception is to be implied at all, it should be narrow and consistent with the constitutional command that exports be immune from taxes and duties (*Pace v. Burgess*). Precedents under the Commerce Clause or analogous areas where there are no express textual prohibitions on taxes and duties should be read with great caution and with a full understanding of the different context in which they were decided. The Government should not be permitted, under the guise of a

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well as to other citizens in common, such as fire and police protection. *E.g., Department of Revenue v. Association of Washington Stevedoring Cos.*, 435 U.S. 734, 753-54 (1978); *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 286-94 (1976). As the Court recently reaffirmed in *IBM*, the Export Clause expressly prohibits the federal government from similar levies.

loose, open-ended user fee exception, to extract tax revenues from export commerce.

II. THE HMT, AN *AD VALOREM* ASSESSMENT ON EXPORTS, IS A "TAX OR DUTY" WITHIN THE PROHIBITION OF THE EXPORT CLAUSE.

In light of the foregoing principles, it is clear that the HMT is an impermissible federal levy on export commerce.

A. The HMT Has the Classic Attributes of a Tax on Exports.

All the basic attributes of the HMT, as imposed on exports, support the lower courts' finding that it is a tax or duty prohibited by the Export Clause. The HMT statute itself, 26 U.S.C. §§ 4461-62, repeatedly refers to the HMT as a "tax," and it is codified in the Internal Revenue Code.[26] The legislative history also frequently refers to the HMT as a "tax."[27] And while "we must regard things rather than names" (*Fairbank*, 181 U.S. at 304, quoting *Pace v. Burgess*, 92 U.S. at 376), the HMT inescapably *operates* as a tax as well.

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[26] All statutory references to the HMT indicate it as a "tax." For example, 26 U.S.C. § 4461 imposes "a *tax* on any port use" and goes on to provide numerous other references to "tax," including "amount of *tax*" and "liability and time of imposition of *tax*." (emphasis added). Chapter 36 of the Internal Revenue Code, where the HMT is codified, is entitled "Certain Other Excise *Taxes*" (emphasis added).

[27] *See e.g.*, S. Rep. No. 126, 99th Cong., 1st Sess. 9 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647 (describing HMT as a "cargo *tax* on the value of the commercial cargo loaded or unloaded"); H.R. Rep. No. 251(IV), 99th Cong., 1st Sess. 23 (1985) (referring to HMT as an "ad valorem *tax*"); H.R. Conf. Rep. No. 1013, 99th Cong., 2d Sess. 228 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6723, 6740 (describing HMT as an "excise *tax*"). (emphasis added).

Most significant is the *ad valorem* nature of the HMT. The tax is imposed in direct proportion to the value of export cargo as the goods are being loaded for export.[28] This value-based approach immediately distinguishes the HMT from the flat-fee stamp charge upheld in *Pace v. Burgess*, where the Court stressed that the small fee "bore no proportion whatever to the quantity or value of the package" to be exported, and that its purpose was to ensure exported tobacco an exemption from an otherwise applicable per-pound levy. 92 U.S. at 375. Twenty-five years later in *Fairbank*, the Court invalidated even a non-graduated stamp fee on export bills of lading, because it could serve as a precedent for "a graduated [*ad valorem*] system," by which "a burden may be cast upon exports sufficient to check or retard them, and which will *directly conflict with the constitutional provision that no tax or duty shall be laid thereon*." 181 U.S. at 291 (emphasis added). And in *A.G. Spalding v. Edwards*, the Court unanimously struck down a federal *ad valorem* sales tax as applied to exports, with the only issue worth discussion being whether the tax was in fact being applied during the export process. 262 U.S. at 69-70. Thus, the Court has consistently recognized that an *ad valorem* tax on exports is precisely what the Framers intended to preclude by the Export Clause.[29]

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[28] The "value" for the purposes of determining the amount of tax is the cargo's value as determined by standard commercial documentation. 26 U.S.C. § 4462(a)(5)(A).

[29] In arguing for the constitutionality of the tax that was struck down in *IBM*, the dissenters stressed that the tax applied to insurance premiums rather than to the cargo itself and that premiums varied only loosely with the cargo's value; hence, "they are not a predictable proxy for a Congress intent upon taxing export value." 116 S. Ct. at 1812 (Kennedy, J.). In contrast, the HMT clearly does tax export value.

The Government characterizes the HMT as a "fee on the use of the ports of the United States." U.S. Br. 12. Even if that characterization were correct, it does not justify an *ad valorem* charge on exports. Particularly given that the Export Clause is to be given "full, liberal construction" (*Fairbank*, 181 U.S. at 289) so as to ensure "liberal protection" for export commerce (*A.G. Spalding*, 262 U.S. at 70), an *ad valorem* fee for the privilege of exporting from a U.S. port could not possibly have been contemplated by the Framers to be a permissible assessment. But in any event, the HMT defines "port use" (the supposed taxable event) as the loading or unloading of cargo for shipment, and the tax is applied without regard to size of vessel, manner or extent of use of port facilities, or any attributes or condition of the port. 26 U.S.C. § 4462(a)(1); *see* Pet. App. 49a. Functionally, then, the assessment is imposed not on "port use," but rather directly on exports. Indeed, it is not the vessel operator or carrier who is liable for the tax, but rather the exporter. 26 U.S.C. § 4461(c)(1)(B).[30]

Other characteristics of the HMT also demonstrate that it is more closely related to exports than other taxes previously struck down under the Export Clause. The HMT, rather than merely being a tax on an instrument or services associated with exports,[31] is imposed directly on the exported articles. Thus, this is not a case where the tax "affect[s] exportation

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[30] *See also* S. Rep. No. 126 at 9, *reprinted in* 1986 U.S.C.C.A.N. at 6647 (the HMT "is not on the harbor, nor is it on the vessel's operator or owner. The tax is set on the value of the cargo, and is to be paid by the owner of the cargo, or his agent.").

[31] Such as the tax on foreign bills of lading in *Fairbank*, on insurance premiums in *Thames & Mersey* and *IBM*, or on charter contracts in *Hvoslef*.

indirectly or remotely," as the Government incorrectly suggests. U.S. Br. 14 n.4.[32]

The term "tax" as used in the Export Clause should be given its "common, and usually expansive" meaning. *IBM*, 116 S. Ct. at 1802. Elsewhere the Court has defined a "tax" as "an enforced contribution to provide for the support of government." *United States v. La Franca*, 282 U.S. 568, 572 (1931); *see also Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 622-23 (1981) ("tax" is "a means of distributing the burden of the cost of government"). The HMT is such a measure. Even assuming that HMT revenues were truly committed to harbor maintenance and port development,[33] those are traditional governmental functions that are undertaken to advance the interests of the nation as a whole and not just for the benefit of identifiable shippers.[34] For 200 years harbor maintenance had been funded from general tax revenues. *See* S. Rep. No. 228, 99th Cong., 1st Sess. 5 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6705, 6709 ("Historically, Federal expenditures for development and operations and maintenance of harbors and ports have been financed from general revenues."). The HMT simply

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[32] For this same reason, this case does not raise the concerns addressed in Justice Kennedy's dissent in *IBM*, which concluded that the Framers did not intend the Export Clause to prohibit taxes on services that may have only an *indirect* effect on the export process. *IBM*, 116 S. Ct. at 1809.

[33] They are not. *See infra* pp. 28-31.

[34] As the Government itself states, "investment in U.S. ports will facilitate economic development and make the Nation's water transportation system more efficient." U.S. Br. 19, quoting S. Rep. No. 228 at 5. *See also* U.S. Br. 5 (improved harbors will enhance U.S. economic competitiveness and help reduce the national trade imbalance). Facilitating economic development, improving the balance of trade, and the like are all national objectives of general public benefit.

substituted one "tax" for another. *See* S. Rep. No. 126 at 2, *reprinted in* 1986 U.S.C.C.A.N. at 6640 (describing the HMT as "a new *tax* to cover a portion of Federal spending on harbor maintenance") (emphasis added).

The existence of the Harbor Maintenance Trust Fund does not alter the fact that the HMT is a tax. When HMT funds are deposited by the Customs Service into the U.S. Treasury, those proceeds are "on budget" and thus included as tax receipts to offset Government deficit calculations.[35] An amount equivalent to HMT receipts is automatically appropriated into the Trust Fund (26 U.S.C. § 9505), but this is a non-event for budget purposes. Harbor maintenance expenditures are reflected in the budget process only to the extent Congress chooses to appropriate monies from the Trust Fund using the normal appropriations process.[36] Thus, the annual surplus generated by the HMT operates, under the congressional budget process, to free up discretionary funds for other government programs. Moreover, the Fund's surplus is invested in government obligations (26 U.S.C. § 9602(b)(1)) and thereby returned to the Treasury for general use.[37]

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[35] Pet. App. 51a. Attempts to make the Harbor Maintenance Trust Fund off-budget have been unsuccessful. In 1996, the House passed the Truth in Budgeting Act, which would have taken the Harbor Maintenance Trust Fund (and certain other trust funds) off-budget for purposes, *inter alia*, of calculating the amount of general discretionary spending available under the Budget Enforcement Act of 1990, 2 U.S.C. § 900 *et. seq.* *See* H.R. 842, 104th Cong., 1st Sess., § 2, *reprinted in* H.R. Rep. No. 499, pt. 1, at 1 (1996). However, the measure did not pass the Senate.

[36] Trust Fund expenditures can be made only "as provided by appropriation Acts." 26 U.S.C. § 9505(c).

[37] The fact that interest earned is returned to the Fund (26 U.S.C. § 9602(b)(3)) only serves to further increase the cumulative Trust Fund surplus, which is reinvested in government obligations in a perpetual cycle of contributions to the general Treasury.

Further, the current statutory provision that Trust Fund amounts may be appropriated only for specified purposes[38] does not necessarily mean that those amounts will ever in fact be so used.[39] Future expenditures will require that a bill pass Congress and be signed by the President, such as would be the case if there were no Trust Fund at all. U.S. Government trust fund balances

> are available to finance future benefit payments and other trust fund expenditures — *but only in a bookkeeping sense*. Unlike the assets of private pension plans, they do not consist of real economic assets that can be drawn down in the future to fund benefits. Instead, *they are claims on the Treasury* that, when redeemed, will have to be financed by raising taxes, borrowing from the public, or reducing benefits or other expenditures. *The existence of large trust fund balances, therefore, does not, by itself, make it easier for the Government to pay benefits.*

Executive Office of the President, Office of Management and Budget, *Analytical Perspectives: Budget of the United States*

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[38] 26 U.S.C. § 9505(c).

[39] Even current law allows payments for uses well beyond mere harbor maintenance. For example, Trust Fund revenues are used for St. Lawrence Seaway Development Corporation rent payments which are transferred to the Department of Transportation. *See Third Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1994* at 2 (1995); J.A. 94-95. Additionally, the National Oceanic and Atmospheric Administration is a potential recipient of funds from the Trust Fund, for activities such as the creation of navigation charts and marine weather forecasting. *See 1995-96 Annual Report* at 3; *see also* Pet. App. 51a, citing Office of Management and Budget, Executive Office of the President, *FY 1996: Budget of the U.S. Government, Appendix*, 376, 802 (1995).

Government Fiscal Year 1996 263 (1995) (emphasis added). In short, Congress has a completely free hand to allow the Trust Fund surplus to increase indefinitely or to redirect HMT revenues by expanding or modifying the Trust Fund's scope or, indeed, by abolishing it altogether.[40]

In sum, the fact that there is a trust fund for HMT revenues is of little or no significance,[41] and indeed the designation of any funds in the U.S. Treasury as a "trust fund" is essentially arbitrary. *See Analytical Perspectives: Budget for Fiscal Year 1996*, at 251 ("Whether or not a

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[40] The Federal budget meaning of the term "trust" differs significantly from its private sector usage. In the private sector, the beneficiary of a trust usually owns the trust's assets, which are managed by a trustee who must follow the stipulations of the trust. In contrast, the Federal Government owns the assets of most Federal trust funds, and it can raise or lower future trust funds collections and payments, or change the purposes for which the collections are used, by changing existing laws.

Executive Office of the President, Office of Management and Budget, *Analytical Perspectives: Budget of the United States Government Fiscal Year 1998* 341 (1997); *see also* Allen Schick, *The Federal Budget: Politics, Policy, Process* 105 (1995) ("[T]he federal government can abolish its trust funds, change the rules for determining what is deposited into them or paid out, or transfer them to other uses."); *Haskins Bros. & Co. v. Morgenthau*, 85 F.2d 677, 685 (D.C. Cir.), *cert. denied*, 299 U.S. 588 (1936) ("it cannot be doubted that Congress has the power to change the use and disposition" of a trust fund statutorily dedicated to the Philippine government).

[41] *See also Commonwealth Edison*, 453 U.S. at 621 n.11 (noting that payment of 50% of a state severance tax on coal into a trust fund did not undermine the conclusion that the tax is a general revenue tax as it is merely an allocation of current tax revenues for use by future generations); *Schneider Transport Inc. v. Cattanach*, 657 F.2d 128, 132 (7th Cir. 1981), *cert. denied*, 455 U.S. 909 (1982) (truck registration fees were taxes despite fact that all revenues generated were deposited into segregated fund used for transportation purposes such as highway construction).

particular fund is designated as a trust fund is, in many cases, arbitrary. Congress has not followed a systematic rule."). It does not alter the conclusion that the HMT is exactly what it claims to be — a "tax."[42]

B. The HMT Is Also a Customs-Type "Duty" Within the Prohibition of the Export Clause.

The Export Clause prohibits not only "taxes" but also "duties" as applied to exports. While "duty" is generally a narrower term than "tax" (*see IBM*, 116 S. Ct. at 1802

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[42] Congress was mindful that the HMT might well be a tax and thus barred by the Export Clause: "the legislative history reflects that the drafters of the Act were abundantly aware of the constitutional infirmity of the Act." Pet. App. 84a (Musgrave, J., concurring). *See, e.g.*, H.R. Rep. No. 251(IV) at 23, 30, 41-42 (1985). In large part because of concerns that the HMT on exports might be vulnerable to constitutional challenge, Congress included a severability clause in the Water Resources Development Act of 1986, Pub. L. No. 99-662, § 949, 100 Stat. 4082, 4201 (codified at 33 U.S.C. § 2304). The House Committee on Merchant Marine and Fisheries noted:

> The concern of the Committee and the subject of the [severability clause] amendment was, for example, that the constitutional arguments that had been made against imposing a tax on exports might result in the legislation being declared invalid and it was the desire of the Committee to preserve all other provisions of the Act if that or a similar provision be found invalid.

H.R. Rep. No. 251(IV) at 30.

In a case involving the HMT as imposed on passengers, the CIT reviewed the severability clause and held that the HMT as applied to exports was severable from the remaining portions of the statute. *Carnival Cruise Lines, Inc. v. United States*, 929 F. Supp. 1570 (Ct. Int'l Trade 1996). Accordingly, the Government's assertion that the court of appeals' decision would "effectively abolish the Trust Fund . . . by voiding the Harbor Maintenance Tax in its entirety" (U.S. Br. 18 n.8) is unfounded. In fact, non-export HMT payments, which are unaffected by this action, constitute the bulk of HMT revenues. *1995-96 Annual Report* at 4.

(comparing prohibited "Imposts and Duties" under the Import-Export Clause with prohibited "taxes" under the Export Clause)), there is ample basis to conclude that the HMT is a prohibited "duty" as well as a prohibited "tax."

The term "duty" has generally been understood to mean those taxes which are imposed on imported or exported merchandise — in short, customs duties. For example, in *Pollock v. Farmers' Loan & Trust Co.*, 158 U.S. 601, 622 (1895), the Court noted:

> Cooley (On Taxation, p. 3) says that the word "duty" ordinarily "means an indirect tax imposed on the importation, exportation or consumption of goods;" having "a broader meaning than custom, which is a duty imposed on imports or exports."

Pollock further observed:

> Mr. Justice Story, in his Commentaries on the Constitution, (¶ 952) expresses the view that it is not unreasonable to presume that the word "duties" was used as equivalent to "customs" or "imposts" by the framers of the Constitution, since in other clauses it was provided that "No tax or duty shall be laid on articles exported from any State," and that "No State shall, without the consent of Congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws;" and he refers to a letter of Mr. Madison to Mr. Cabell, of September 18, 1828, to that effect. 3 Madison's Writings, 636.

Pollock, 158 U.S. at 622. *See also Brown v. Maryland*, 25 U.S. at 437 (defining duty on imports as "a custom or a tax levied on articles brought into a country").[43]

The HMT is indistinguishable from a traditional customs duty, for it is a direct assessment on cargo entering and leaving the country. Furthermore, like most customs duties, it is imposed on an *ad valorem* basis directly against the value of the merchandise being shipped. And, like all such customs duties, the HMT is assessed without limitation as to the amount which may be owed, rather than being subject to a maximum ceiling; the HMT increases with the value of the exported merchandise, just as customs duties typically do with imported merchandise.

Not surprisingly, therefore, the HMT statute provides that "all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the [HMT] *as if such tax were a customs duty*." 26 U.S.C. § 4462(f)(1) (emphasis added). Congress thus determined that the Customs Service is the appropriate agency to collect, administer and enforce the HMT in view of its "strong presence at ports of entry" and its "experience[] at appraising imported merchandise." S. Rep. No. 228 at 10, *reprinted in* 1986 U.S.C.C.A.N. at 6714.

In further recognition that the HMT is a customs duty, Congress provided that "[f]or purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the [HMT] shall be treated *as if such tax were a customs duty*." 26 U.S.C. § 4462(f)(2) (emphasis added). Accordingly, Congress provided that the Court of International Trade, with its centralized jurisdiction over

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[43] *Black's Law Dictionary* 505 (6th ed. 1990) similarly states: "In its most usual signification this word [duties] is the synonym of imposts or customs; *i.e.* tax on imports...." *Black's* also states that the term "customs" is "usually applied to those taxes which are payable upon goods and merchandise imported or exported." *Id.* at 386, citing *Pollock*, *supra*.

virtually all transactions involving customs duties, should have jurisdiction over actions involving the HMT. *See* S. Rep. No. 228 at 10, *reprinted in* 1986 U.S.C.C.A.N. at 6715.[44]

In sum, the HMT as applied to exports is indistinguishable from a customs duty both in terms of how it is assessed and how it was treated by Congress. Accordingly, the HMT falls within the express language of the Export Clause as a prohibited "duty" on exported articles.[45]

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[44] *Amici* Arctic Cat *et al.* contend that the CIT lacked subject matter jurisdiction over this case under 28 U.S.C. § 1581. That contention is incorrect. Congress expressly provided that "[f]or purposes of determining the jurisdiction of any court of the United States . . ., the tax imposed by this subchapter [*i.e.*, the HMT] shall be treated as if such tax were a customs duty." 26 U.S.C. § 4462(f)(2). The CIT has broad jurisdiction over customs matters, and thus it should be "beyond dispute that Congress intended the [CIT] to have jurisdiction over disputes regarding the HMT." Pet. App. 14a. *See also* S. Rep. No. 228 at 10, *reprinted in* 1986 U.S.C.C.A.N. at 6715 (CIT "is to have primary jurisdiction for actions involving the port user charge provisions.").

In the courts below, the parties agreed that the CIT had jurisdiction under 28 U.S.C. § 1581, but disagreed as to the applicable subsection. Both courts below unanimously held that subsection (i), rather than subsection (a), applies. As the court of appeals explained, the HMT applies to imports as well as exports, and section 1581(i) confers jurisdiction in actions arising out of laws that provide for "administration and enforcement with respect to" specified matters, including "revenue from imports." 28 U.S.C. § 1581(i)(1),(4). Pet. App. 14a. The Government did not seek review of that jurisdictional holding because "[w]hether the jurisdiction of the court rests upon 28 U.S.C. 1581(a) . . . or upon 28 U.S.C. 1581(i) . . . has no relevance to the proper disposition of this case." Pet. 7 n.2; U.S. Br. 7-8 n.3. *See also*, *supra* p. 4 n.2; Resp. C.A. Br. 21-24 (discussing jurisdictional issue).

[45] Labeling the HMT as a "user fee" does not alter its basic character as a customs duty. *See Best Foods, Inc. v. United States*, 218 F. Supp. 576, 580-81, 50 Cust. Ct. 94, 99 ("fee" imposed on imported merchandise to ensure viability of domestic price support program held, "in truth," to be a customs duty), *modified on other grounds*, 51 C.C.P.A. 1 (1963).

C. The Government's Characterization of the HMT as a "User Fee" Was Correctly Rejected by the Lower Courts.

In an attempt to avoid the Export Clause, the Government is relegated to arguing that the Harbor Maintenance Tax is a "user fee" and not a "tax or duty." As just discussed, however, the HMT meets the classic standards of a "tax or duty" as those terms appear in the Export Clause. And, as discussed in Part I above (at 18-21), the principal "user fee" cases cited by the Government are inapposite because they did not involve the Export Clause: *Massachusetts* involved an implied intergovernmental tax immunity; *Evansville*, the Commerce Clause; and *Sperry*, the Just Compensation Clause. The express and categorical prohibition of the Export Clause requires a different and stricter analysis than applied in those cases.

Accordingly, any "user fee" exception to the Export Clause should be narrowly limited to fees that "are in no sense a duty" but instead are "simply the compensation given for services properly rendered." *Pace v. Burgess*, 92 U.S. at 375. This requires that the fees be very closely related to use of a government service (*cf. Massachusetts*, 435 U.S. at 464 ("some fair approximation of use")) and be no greater than absolutely necessary to compensate the government for the tendered service (*cf.* the Import-Export Clause ("except what may be absolutely necessary for executing [the State's] inspection Laws"); *Massachusetts*, 435 U.S. at 469 (the charge may not be "excessive in relation to the cost of the Government benefits supplied")). As the lower courts correctly held, the HMT fails even to meet the *Massachusetts/Evansville* standard, and *a fortiori* it fails to meet the more restrictive standard that should apply under the Export Clause.

1. The HMT Is Not Closely Related to the Exporter's Usage of Harbor Maintenance Services.

The HMT bears no close relationship to an exporter's use of federal harbor maintenance services. Indeed, the lower courts properly concluded that the HMT fails to meet even the *Massachusetts* standard of "fair approximation of use."

a. The very nature of the HMT — an *ad valorem* tax assessed upon merchandise loaded for export — virtually compels this conclusion. The HMT is computed against the value of the cargo, irrespective of its weight, size, and amount or type of port use. No distinction is made between natural deep-water ports that require little or no maintenance, and those requiring extensive development and/or maintenance. Nor is any distinction made based on the type of cargo or vessel being employed. Exporters of low-value, high-bulk cargo, who require deep draft vessels and thus a greater degree of dredging, benefit from maintenance services to a much greater extent than exporters of high-value, low-bulk cargo, who need only a shallow draft harbor. Yet, the former pay less HMT than the latter.

The Army Corps of Engineers has acknowledged that there is "no relationship between the amount of money spent on a port's maintenance, and the amount of revenue collected from cargo moving in or out of that particular port." Army Corps of Engineers, *Briefing Book and Fact Sheets on the Harbor Maintenance Fee and Trust Fund* at 1 (Feb. 14, 1990); J.A. 77. Indeed, most large ports accounting for the majority of HMT revenues receive no more than 30% back in maintenance services. Pet. App. 60a, citing Army Corps of Engineers, *Estimated Receipts of Harbor Maintenance Fee from Cargo Transiting Major Ports* (1992) (draft document); J.A. 85-86. To cite one example, of an estimated $78,711,000 in 1992 taxes on exports and imports collected at

the Port of Los Angeles, only $162,000 was returned in federal port services. J.A. at 85.

The Government contends that by imposing the HMT on an *ad valorem* basis, "Congress rationally concluded that shippers of higher value cargo would receive greater benefits (*e.g.*, greater profits)" from port maintenance. U.S. Br. 28. But this simply demonstrates that the HMT is not tied to use, but rather, like a typical tax, is based on a taxpayer's presumed ability to pay. Moreover, the court of appeals properly observed that "the government has failed to present any facts that would suggest that, even on average," higher value merchandise correlates with higher profits. Pet. App. 22a. One exporter may take a $100,000 loss on a cargo of precious gems valued at $10 million, while another may make a $100,000 profit on cargo of cement valued at $1 million. Thus, the Government's own argument reinforces the conclusion that the HMT does not approximate use of harbor maintenance services, but is instead a traditional *ad valorem* tax.[46]

Sperry, on which the Government relies heavily, does not require a contrary conclusion. There, the Court upheld an *ad valorem* deduction from awards by the Iran-U.S. Claims Tribunal as a means to reimburse the Government for claim-arbitration expenses. While it could be said that the award recipient in *Sperry* benefitted generally in proportion to the size of the award, thus justifying an *ad valorem* assessment, the same cannot be said in the HMT context, where higher value cargo simply does not equate with a higher return (*i.e.*,

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[46] Accordingly, the Federal Circuit correctly distinguished *Alamo Rent-A-Car v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), relied on by the Government in the proceedings below and in its brief here (pp. 18, 25). Unlike in *Alamo*, where an airport access fee was found to represent, "on average," a rental car company's use of an airport facility, there has been no finding that the HMT represents, "on average," an exporter's port usage. Pet. App. 21a.

profit) to the exporter. In any event, as the court of appeals properly observed, *Sperry* is also inapplicable for another reason — it concerned the Just Compensation Clause, not the Export Clause. Pet. App. 19a-20a; *see also supra* p. 19 n.21.

Thus, contrary to the Government's assertion (U.S. Br. 26), the court of appeals heeded this Court's admonition that the validity of a charge is to be "judged by its results, not its formula." The court of appeals examined the results that follow from the *ad valorem* application of the tax and properly concluded that the HMT is not based upon a fair approximation of use. Moreover, the court of appeals did not insist on a "precise calibration" to use. U.S. Br. 22, 24. The court of appeals, after analyzing the application of the HMT, merely recognized the lack of any reasonable correlation between the amount of HMT and the amount of use of governmental services. Indeed, the court of appeals actually gave the Government the benefit of any doubt and concluded that even if the *Massachusetts* "fair approximation of use" test refers, as the Government contended, to the *value* of the benefits received rather than the *costs* of the benefits received, the HMT still would not be a fair approximation. Pet. App. 21a-22a.

b. As stated by the court of appeals, another defect of the HMT is that exporters are required to pay for maintenance of ports all over the country, irrespective of any use made outside of the exporters' particular locality. Pet. App. 22a. The Government maintains that a similar rationale was rejected in *Massachusetts* (U.S. Br. 29), but the services there at issue were fundamentally different. *Massachusetts* involved civil aviation, the "integrated national airsystem," and "a wide array of air navigational facilities and services that benefit all aircraft flying in the Nation's navigable airspace." 435 U.S. 446-47. Harbor services, by their very nature, are more location-specific; an exporter who ships oranges from Miami, Florida, gains no benefit from dredging operations in Portland, Oregon, through which he never ships. The broad,

nationwide scope of the HMT funding program shows it to be a revenue-raising measure, not a user fee.[47]

Further, the tax regime in *Massachusetts* "fairly reflect[ed] the benefits received" by aircraft operators since the levies were either "geared directly to use" or "g[a]ve weight to factors affecting the level of use" (weight and speed of the aircraft, etc.). *Id.* at 468-69. The HMT makes no effort to apportion its burden to the level of use of government services, local or nationwide.[48]

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[47] By comparison, expenditures from the funds generated by the *per capita* inspection fee for immigrants in the *Head Money Cases*, 112 U.S. 580 (1884), were limited "in any port [to] the sum received from [that port]" (*id.* at 590), and the State fees authorized by Congress under the Harbor Development and Navigation Improvement Act (*see supra* p. 23) may be imposed only to cover the costs of improvements at the particular harbor in question. 33 U.S.C. § 2236(a)(1).

Amicus Oregon argues that the United States is seeking to develop an intermodel freight transportation system (road, rail, air and water) to improve access to ports. Perhaps so, but this does not mean that individual harbors constitute an integrated whole in the sense that the nation's air system does. Moreover, under Oregon's argument, the federal government could impose a "user fee" on exports that included governmental expenses related not just to all harbors but also to rail, road, and air systems. The supposed "user fee" exception to the Export Clause would swallow the rule.

[48] And, as already noted, *Massachusetts* involved an implied immunity principle, under which the taxpayer (the State) was not protected against nondiscriminatory taxes that did not have an undue, destructive impact on State functions. 435 U.S. at 462, 466. In that context, "[t]he possibility of a slight overcharge is [not] offensive to the constitutional structure." *Id.* at 466. By comparison, the prohibitions of the Export Clause are explicit and unqualified: "A 10-cent tax or duty is in conflict with that provision as certainly as a 100-dollar tax or duty. Constitutional mandates are imperative. The question is never one of amount, but one of power." *Fairbank*, 181 U.S. at 291.

c. The Government also attacks the court of appeals for giving weight to the fact that the HMT is imposed on the exporter, at best an indirect beneficiary of harbor maintenance, rather than on the vessels that actually navigate the harbors. U.S. Br. 21-24. However, a fundamental premise of a user fee is the Government's "interest in making those who *specifically* benefit from its services pay the cost." *Massachusetts*, 435 U.S. at 462 (emphasis added). The imposition of a burden on a party who does not directly benefit from its expenditure is a hallmark of a tax. *See Commonwealth Edison Co.*, 453 U.S. at 622 ("Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied."), quoting *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-22 (1937). The court of appeals, therefore, correctly observed that harbor maintenance directly benefits ship owners[49] and only indirectly benefits exporters.[50]

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[49] As the Senate Committee stated: "These fees and taxes [the HMT] offset services rendered to *vessels*." S. Rep. No. 126 at 7, *reprinted in* 1986 U.S.C.C.A.N. at 6644 (emphasis added).

[50] The Government contends that it does not matter whether the HMT is paid by exporters or by the carriers of export cargo because the burden created by the HMT is "allocated by economics, not by statutes." U.S. Br. 23, quoting Mayer, J., dissenting. In other words, even if vessel operators had to pay the HMT, they could simply pass the tax on to exporters. *Id.* In reality, however, it is far from certain that vessel operators could do so. In testimony before the Senate Finance Committee, a representative of numerous common carriers unequivocally stated that "there should be no illusions that carriers could pass on the cost" of the HMT. *User Fees for Ports and Waterways: Hearing Before the Senate Comm. on Finance*, 99th Cong., 1st Sess. 105 (1985) (Statement by Marc J. Fink on Behalf of 28 Ocean Common Carriers of Freight).

Moreover, if the Government were truly interested in the allocative effects of a tax, it would appreciate that a vessel-specific tax would have

d. Finally, as recognized by the court of appeals, the Government's claims of the administrative convenience of an *ad valorem* tax (U.S. Br. 27) cannot save the HMT. Pet. App. 23a. As demonstrated *supra*, Part I, the broad protection guaranteed by the Export Clause requires that any user fee exception be very narrowly drawn, and the mere contention of administrative convenience cannot make the HMT fit within those narrow parameters. *See, e.g., Pace v. Burgess*, 92 U.S. at 375 (fee must be "*necessary* in order to give to the exporter the benefit of *exemption from taxation*") (emphasis added); *cf. Kraft General Foods, Inc. v. Iowa Dep't of Revenue & Finance*, 505 U.S. 71, 81 (1992) (State may not, under the dormant Commerce Clause, defend a discriminatory tax on grounds of administrative convenience "[a]bsent a *compelling justification*" that a legitimate state interest cannot otherwise be served) (emphasis added).

In any event, although the Government argues that any alternative to the *ad valorem* HMT would entail unreasonable administrative costs and burdens (U.S. Br. 27-28, 30), Congress plainly concluded that the alternative approach of the Harbor Development and Navigation Improvement Act of 1986 (*supra* p. 23) could readily be administered by States and localities. That Act authorizes States to "levy port or harbor dues (in the form of tonnage duties or fees) on a vessel engaged in trade entering or departing from a harbor and on cargo loaded on or unloaded from [the] vessel." 33 U.S.C. § 2236(a). The Act permits the imposition of fees only for certain projects and services, only on a project-specific basis, and only on ships of a type or size that benefitted from the improvement in question (*e.g.*, a shallow-draft vessel cannot

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the beneficial effect of encouraging the use of harbor-friendly vessels that required less harbor maintenance. An *ad valorem* tax on cargo gives neither the shipper nor the vessel owner any incentive to minimize such costs.

be charged for dredging from which it received no benefits). *Id.*[51]

The Government notes that U.S. Shoe acknowledged in its opposition to the Petition for Certiorari that Congress could have adopted a *bona fide* user fee. U.S. Br. 29-30. This does not in any way validate the approach which Congress adopted in the HMT, namely, an *ad valorem* assessment directly on exported merchandise and unrelated to the amount, if any, of federal services used by the exporter.

2. The Revenues Collected Are Substantially in Excess of the Costs of Harbor Maintenance.

In addition to the HMT not being closely (or even remotely) tied to use of harbor maintenance services, HMT revenues collected by the government are clearly excessive in relation to the federal costs of harbor maintenance. The Government states that the Harbor Maintenance Trust Fund "has provided *approximately* 100 percent" of the funds currently used for harbor maintenance (U.S. Br. 6 n.2; emphasis added) and that the fund's "current[]. . . positive balance" can be explained by year-to-year fluctuations in needs (*id.* at 17). But the record contains no evidence even suggesting that the current (and growing) fund surplus is temporary or related in any way to projected maintenance needs.

[51] It is noteworthy that although the legislative history refers to the Harbor Development and Navigation Improvement Act fees as "local user fees" (*see* S. Rep. No. 126 at 56, *reprinted in* 1986 U.S.C.C.A.N. at 6677), Congress treated even those assessments not as user fees, but rather as imposts or duties. This is evident from the fact that in 33 U.S.C. § 2236(a) (entitled "Consent of Congress"), Congress recognized the need to expressly authorize States to levy those charges under the Import-Export Clause. Because those port or harbor dues thus were treated by Congress as other than a user fee, the HMT clearly cannot be considered a user fee.

To the contrary, as the CIT found, since its inception the HMT has generated revenues far in excess of total costs, as demonstrated by the ever-growing surplus accumulated in the Trust Fund. Pet. App. 51a. The Fund surplus stood at $865 million as of fiscal year 1996 and is projected to mushroom to nearly $3 billion as of fiscal year 2001. *1995-96 Annual Report* at 7. As the CIT further noted, even as to possible future application of the Fund, the HMT "is used to fund projects yet to be commenced, *or even envisioned*, rather than to repay the government for services rendered." Pet. App. 60a (emphasis added). The Executive Branch has itself recognized the surplus to be of "continu[ing]" and "growing" concern. *1995-96 Annual Report* at 7-8. Even Judge Mayer, the sole dissenting judge below, found that the Trust Fund's large and ever-growing surplus was "troubling." Pet. App. 43a.

The *Massachusetts* Court indicated that the required relationship between an assessment and governmental costs "places a natural ceiling on the total amount that such charges may generate." 435 U.S. at 467. Plainly, the HMT, which is imposed *ad valorem* without limitation, is not subject to any "natural ceiling," as evidenced by the continually growing surplus. Furthermore, unlike *Massachusetts*, where the assessment "did not come close to recovering the costs" of the government services in question (435 U.S. at 469 n.24), the HMT has vastly exceeded federal expenditures for harbor maintenance. HMT revenues patently do not bear any relationship to the Government's harbor maintenance costs, current or projected, much less the very close relationship that should be demanded under the Export Clause.

CONCLUSION

Both courts below correctly applied this Court's precedents and properly found that the HMT on exports is a prohibited "tax or duty" under the Export Clause. The judgment below should be affirmed.

Respectfully submitted,

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APPENDIX

26 U.S.C. § 4462(f)(1)-(2) provides:

Extension of provisions of law applicable to customs duty.-

(1) In general.— Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty. For purposes of the preceding sentence, any penalty expressed in terms of a relationship to the amount of the duty shall be treated as not less than the amount which bears a similar relationship to the value of the cargo.

(2) Jurisdiction of courts and agencies.— For purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty.

26 U.S.C. § 9505 provides:

Harbor Maintenance Trust Fund

(a) Creation of trust fund.— There is hereby established in the Treasury of the United States a trust fund to be known as the "Harbor Maintenance Trust Fund", consisting of such amounts as may be—

(1) appropriated to the Harbor Maintenance Trust Fund as provided in this section,

(2) transferred to the Harbor Maintenance Trust Fund by the Saint Lawrence Seaway Development Corporation pursuant to section 13(a) of the Act of May 13, 1954, or

(3) credited to the Harbor Maintenance Trust Fund as provided in section 9602(b).

(b) Transfer to Harbor Maintenance Trust Fund of amounts equivalent to certain taxes.— There are hereby appropriated to the Harbor Maintenance Trust Fund amounts equivalent to the taxes received in the Treasury under section 4461 (relating to harbor maintenance tax).

(c) Expenditures from Harbor Maintenance Trust Fund.— Amounts in the Harbor Maintenance Trust Fund shall be available, as provided by appropriation Acts, for making expenditures —

(1) to carry out section 210 of the Water Resources Development Act of 1986 (as in effect on the date of the enactment of the Water Resources Development Act of 1996),

(2) for payments of rebates of tolls or charges pursuant to section 13(b) of the Act of May 13, 1954 (as in effect on April 1, 1987), and

(3) for the payment of all expenses of administration incurred by the Department of the Treasury, the Army Corps of Engineers, and the Department of Commerce related to the administration of subchapter A of chapter 36 (relating to harbor maintenance tax), but not in excess of $5,000,000 for any fiscal year.

26 U.S.C. § 9602 provides:

Management of Trust Funds

* * *

(b) Investment.—

(1) **In general.**—It shall be the duty of the Secretary of the Treasury to invest such portion

of any Trust Fund established by subchapter A as is not, in his judgment, required to meet current withdrawals. Such investments may be made only in interest-bearing obligations of the United States...

33 U.S.C. § 2236(a)(1)-(4) provides:

Port or harbor dues

(a) Consent of Congress

Subject to the following conditions, a non-Federal interest may levy port or harbor dues (in the form of tonnage duties or fees) on a vessel engaged in trade entering or departing from a harbor and on cargo loaded on or unloaded from that vessel under clauses 2 and 3 of section 10, and under clause 3 of section 8, of Article 1 of the Constitution:

(1) Purposes

Port or harbor dues may be levied only in conjunction with a harbor navigation project whose construction is complete (including a usable increment of the project) and for the following purposes and in amounts not to exceed those necessary to carry out those purposes:

(A)(i) to finance the non-Federal share of construction and operation and maintenance costs of a navigation project for a harbor under the requirements of section 2211 of this title; or

(ii) to finance the cost of construction and operation and maintenance of a navigation project for a harbor under section 2232 or 2233 of this title; and

(B) provide emergency response services in the harbor, including contingency planning, necessary personnel training, and the procurement of equipment and facilities.

(2) Limitation on port or harbor dues for emergency service

Port or harbor dues may not be levied for the purposes described in paragraph (1)(B) of this subsection after the dues cease to be levied for the purposes described in paragraph (1)(A) of this subsection.

(3) General limitations

(A) Port or harbor dues may not be levied under this section in conjunction with a deepening feature of a navigation improvement project on any vessel if that vessel, based on its design draft, could have utilized the project at mean low water before construction. In the case of project features which solely —

(i) widen channels or harbors,

(ii) create or enlarge bend easings, turning basins or anchorage areas, or provide protected areas, or

(iii) remove obstructions to navigation,

only vessels at least comparable in size to those used to justify these features may be charged under this section.

(B) In developing port or harbor dues that may be charged under this section on vessels for project features constructed under this subchapter, the non-Federal interest may consider such criteria as: elapsed time of passage, safety of passage, vessel economy of scale, under keel clearance, vessel draft, vessel squat, vessel speed, sinkage, and trim.

(C) Port or harbor dues authorized by this section shall not be imposed on —

(i) vessels owned and operated by the United States Government, a foreign country, a State, or a political subdivision of a country or State, unless engaged in commercial services;

(ii) towing vessels, vessels engaged in dredging activities, or vessels engaged in intraport movements; or

(iii) vessels with design drafts of 20 feet or less when utilizing general cargo and deep-draft navigation projects.

(4) Formulation of port or harbor dues

Port or harbor dues may be levied only on a vessel entering or departing from a harbor and its cargo on a fair and equitable basis. In formulating port and harbor dues, the non-Federal interest shall consider —

(A) the direct and indirect cost of construction, operations, and maintenance, and providing the facilities and services under paragraph (1) of this subsection;

(B) the value of those facilities and services to the vessel and cargo;

(C) the public policy or interest served; and

(D) any other pertinent factors.

Supreme Court, U.S.
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No. 97-372

In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES SHOE CORPORATION

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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This Court long ago concluded that the Export Clause, U.S. Const. Art. I § 9, Cl. 5, does not prohibit the United States from imposing a fee on exports that exacts "compensation * * * for services properly rendered." *Pace* v. *Burgess*, 92 U.S. 372, 375 (1876). "[R]evenue measures that operate only to compensate a government for benefits supplied" are not constitutionally proscribed, for the government "has an obvious interest in making those who specifically benefit from its services pay the cost" (*Massachusetts* v. *United States*, 435 U.S. 444, 462 (1978)). Foreign commerce, like domestic commerce, "may be made to pay its own way" (*Complete Auto Transit, Inc.* v. *Brady*, 430 U.S. 274, 281 (1977)). See, *e.g.*, *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261, 266 (1935) (citing cases).

Respondent therefore ultimately acknowledges, as it must, that the prohibition in the Export Clause against a "tax or duty" on exports does not preclude Congress from imposing "a *bona fide* user fee" on exporters and other shippers who benefit from government services (Resp. Br. 42). The narrow question presented in this case is thus simply whether, under the standards that the Court applies for this purpose, the non-discriminatory port-use charge imposed on exports and other goods under the Harbor Maintenance Tax, 26 U.S.C. 4461(a), is a proscribed "tax" or is instead a permissible user fee.

1. Courts have been required to distinguish "taxes" from "fees" in a variety of contexts. "Yet, in doing so, they have analyzed the legal issues in similar ways." *San Juan Cellular Telephone Co.* v. *Public Service Commission*, 967 F.2d 683, 685 (1st Cir. 1992) (Breyer, C.J.):

> They have sketched a spectrum with a paradigmatic tax at one end and a paradigmatic fee at the other. The classic "tax" is imposed by a legislature upon many, or all, citizens. It raises money, contributed to a general fund, and spent for the benefit of the entire community.

By contrast, the classic "fee" is imposed narrowly on those who use and benefit from a governmental service and is designed to "rais[e] money placed in a special fund to help defray" the costs of providing that service. *Ibid.*

In every context in which this Court has addressed the distinction between a permissible "fee" and a proscribed "tax," the Court has explained that a "fee" is a charge imposed on those who use a government service that is designed to "defray the expense" of that

service (*Head Money Cases*, 112 U.S. 580, 596 (1884)). Fees designed to recover the costs of services that facilitate commerce—such as pilotage, tonnage, wharfage, and stevedoring charges—have consistently been upheld. *Clyde Mallory Lines* v. *Alabama*, 296 U.S. at 267 ("Charges levied by state authority to defray the cost of regulation or of facilities afforded in aid of interstate or foreign commerce have consistently been held to be permissible"). This is because, as this Court held in *Packet Co.* v. *Keokuk*, 95 U.S. 80, 84 (1877), "a charge for services rendered or for conveniences provided is in no sense a tax or a duty."

In determining whether a governmental charge is a permissible "user fee" or an impermissible "tax" under the Export Clause, the Court has therefore focussed on whether the purpose of the charge is to earn revenue or is instead to compensate the government for "services properly rendered." *Pace* v. *Burgess*, 92 U.S. at 375. The Court has concluded that "[t]he point to guard against" is not the assessment of a "fee" that seeks to recover the costs of services rendered to exports but rather "the imposition of a duty under the pretext of fixing a fee." *Id.* at 367. See also *Fairbank* v. *United States*, 181 U.S. 283, 304 (1901); *Moon* v. *Freeman*, 379 F.2d 382, 391 (9th Cir. 1967).[1]

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[1] The Taxing Power and the Commerce Power are distinct and independent sources of legislative authority. *Gibbons* v. *Ogden*, 22 U.S. (9 Wheat.) 1, 196, 198-202 (1824). See also *Board of Trustees* v. *United States*, 289 U.S. 48, 58 (1933); Pet. Br. 14 n.4. The Export Clause limits the Taxing Power. It does not limit the authority of Congress to regulate interstate and foreign commerce through the imposition of fees that seek compensation for government services. See *Pace* v. *Burgess*, 92 U.S. at 375.

In *Evansville-Vanderburgh Airport Authority District* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), and *Massachusetts* v. *United States*, 435 U.S. 444 (1978), the Court has concluded that a "fee" that compensates a government for services rendered to commerce does not constitute a "tax" if the fee (i) does "not discriminate against" a constitutionally protected interest, (ii) is "based upon some fair approximation of use" and (iii) is "not shown to be excessive in relation to the cost to the government of the benefits conferred." 435 U.S. at 464; see also *Evansville-Vanderburgh*, 405 U.S. at 716-717. For the reasons described in our opening brief and the additional reasons set forth below, the charge that Congress imposed on goods that move through the ports of the United States under the Harbor Maintenance Tax constitutes a valid "fee" for government services—and not a proscribed "tax"—under these established criteria.

2. Respondent argues, however, that the Court should reject the settled criteria that it has applied in distinguishing between proscribed "taxes" and permissible "fees." Respondent contends that, in determining whether the Harbor Maintenance Tax is proscribed under the Export Clause, the Court should formulate a different and stricter test than it has applied in all other contexts. Neither logic nor authority supports respondent's contention.

a. Respondent errs initially by asserting that there is "no Export Clause precedent for the approach urged by the Government" (Resp. Br. 15). In making that assertion, respondent seemingly overlooks the seminal decision in *Pace* v. *Burgess*, 92 U.S. at 375. That decision is, of course, "Export Clause precedent," for it arises under and interprets that Clause.

Moreover, the holding of *Pace* that the government may demand a "fee" as "compensation * * * for services properly rendered" (*ibid.*) has been reiterated by this Court in the many decisions that led to the formulation of the test adopted and applied in *Evansville-Vanderburgh* and *Massachusetts*. See, *e.g.*, *Evansville-Vanderburgh*, 405 U.S. at 712-713, quoting *Hendrick* v. *Maryland*, 235 U.S. 610, 624 (1915) ("where a State at its own expense furnishes special facilities for the use of those engaged in commerce, * * * it may exact compensation therefor"); *Packet Co.* v. *Keokuk*, 95 U.S. at 84. The Export Clause precedent in *Pace* was the root of, not an exception to, the test adopted by this Court to distinguish between proscribed "taxes" that raise general revenues and permissible "fees" that seek "compensation * * * for services properly rendered" (*Pace* v. *Burgess*, 92 U.S. at 375).

Respondent attempts to distinguish *Pace* as involving only "a limited government fee * * * designed solely to cover the government's admininstrative expenses" in enforcing the revenue laws (Resp. Br. 17). That effort to limit *Pace* to its facts draws no support from the text or reasoning of that decision. In *Pace*, as in the contemporaneous decision in *Packet Co.* v. *Keokuk*, 95 U.S. at 84, the Court relied on the already well-established rule that a government fee that seeks compensation for services rendered to commerce "is in no sense a tax or a duty" (*ibid.*). As early as *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) 298, 313 (1851), the Court had emphasized that "fees and charges for pilotage" and "port charges for services rendered to vessels or cargoes" are "distinct from" the "[i]mposts and duties" that the Constitution proscribes. In neither *Pace* nor any subsequent

case has the Court limited the established distinction between permissible user "fees" and proscribed "taxes" in the strained manner that respondent now proposes.

To the contrary, the decisions of this Court recognize that constitutionally permissible fees are *not* "limited * * * to * * * the government's administrative expenses" (Resp. Br. 17). The Court has long held that a government may properly seek compensation for *all* "services rendered to and enjoyed by [a] vessel" engaged in domestic and foreign commerce. *Clyde Mallory Lines* v. *Alabama*, 296 U.S. at 266. To confuse fees charged for "services rendered" with the "taxes" and "duties" that are proscribed by the Constitution "would be to confound things" that this Court has long and consistently held to be "essentially different" (*Cooley*, 53 U.S. (12 How.) at 313).

b. Respondent nonetheless urges that any test employed to distinguish between "fees" and "taxes" under the Export Clause "should be narrow and consistent with the constitutional command that exports be immune from taxes and duties" (Resp. Br. 23). But to say that "taxes" are "strictly" proscribed by the Export Clause adds nothing to the constitutional text. Nor does such a statement refute the longstanding precedent of this Court that "fees" that compensate a government for services rendered to commerce are *not* proscribed precisely because such fees are "in no sense a tax or a duty." *Packet Co.* v. *Keokuk*, 95 U.S. at 84. See, *e.g.*, *Massachusetts*, 435 U.S. at 462-464; *Evansville-Vanderburgh*, 405 U.S. at 716-720. Even a "strict" enforcement of a prohibition against any "tax or duty" does not prohibit the assessment of a charge that is "in no sense a tax or a duty."

Indeed, this Court long ago rejected the suggestion that a constitutional provision that contains a "strict" prohibition against "taxes or duties" prohibits governments from charging fees that are designed to recover costs incurred in providing services to commerce. In *Clyde Mallory Lines* v. *Alabama*, 296 U.S. at 265, the Court considered the effect of the constitutional "prohibition against tonnage duties" which, as the Court explained, supplements the constitutional prohibition against "duties on imports and exports." The Court stated that this provision (*ibid.*)

> has been deemed to embrace all taxes and duties regardless of their name or form, and even though not measured by the tonnage of the vessel, which operate to impose a charge for the privilege of entering, trading in, or lying in a port * * * .

The Court held, however, that this strict prohibition against "all taxes and duties" (*id.* at 266) (citing cases)

> does not extend to charges made by state authority, even though graduated according to tonnage, for services rendered to and enjoyed by the vessel, such as pilotage * * * or wharfage * * * or charges for the use of locks on a navigable river * * * or fees for medical inspection * * *.

c. Respondent similarly errs in asserting (Resp. Br. 18-21) that the test applied by this Court to distinguish between permissible fees and proscribed taxes in the *Evansville-Vanderburgh* and *Massachusetts* decisions has no relevance under the Export Clause. In deciding whether a charge for a governmental service is a "fee" or a "tax," it is obviously relevant whether the charge is "based upon some fair

approximation of use" and is "not shown to be excessive in relation to the cost to the government" (*Massachusetts* v. *United States*, 435 U.S. at 464). Those are simply definitional parameters of a permissible "fee" that seeks to recover "compensation * * * for services properly rendered" (*Pace* v. *Burgess*, 92 U.S. at 375). Indeed, respondent does not directly dispute that these two factors are appropriate in determining whether a "fee" is permissible.

Respondent suggests, however, that the third requirement of *Massachusetts*—that the fee "not discriminate against" a constitutionally protected interest (435 U.S. at 464)—"is an irrelevant factor" under the Export Clause because even non-discriminatory taxes may not be applied to exports under that Clause (Resp. Br. 20). That contention, however, misunderstands the logical underpinings of the "non-discrimination" requirement of the *Massachusetts* test. That requirement ensures that even an *otherwise* permissible fee—one that is properly designed to obtain compensation for services rendered by government—will not be sustained if that fee is charged *only* to export goods. A charge for services that is imposed *only* on exports would be "the imposition of a duty under the pretext of fixing a fee." *Pace* v. *Burgess*, 92 U.S. at 376.

In the present case, however, it is undisputed that the Harbor Maintenance Tax applies without discrimination to exports, imports and domestic shipments alike. See Pet. Br. 20-21 & n.10. All goods moving through the ports of the United States are equally required to pay compensation for the services provided by the United States to this commerce. 26 U.S.C. 4461(a).

d. Finally, respondent errs in its reliance upon *United States* v. *International Business Machines Corp. (IBM)*, 116 S. Ct. 1793 (1996), as support for a more "strict" test to distinguish between fees and proscribed taxes under the Export Clause. The question addressed and decided in the *IBM* case was "whether the Export Clause of the Constitution permits the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit." *Id.* at 1795. The Court held "that it does not." *Ibid.* That holding—and that decision in its entirety—addresses only whether an acknowledged "tax" may be applied to exports when the same tax also applies to other goods.[2] Nothing in that holding touches upon the analytically different issue presented in this case—whether the port use fee imposed by the Harbor Maintenance Tax is a proscribed "tax" or a permissible "fee." As long ago as *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) at 314, this Court admonished in a case arising under the Import-Export

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[2] At an earlier stage of this case, the government argued that, even if the Harbor Maintenance Tax were regarded as a "tax" rather than a "user fee" (Pet. App. 23a), this assessment would nonetheless be constitutional because it applies without discrimination to exports, imports and domestic commerce alike. During the pendency of litigation, the Court rejected an indistinguishable contention in the *IBM* case (116 S. Ct. at 1795). The government has therefore abandoned that position in this case and now raises only the claim that the Harbor Maintenance Tax is "a permissible user fee" under the analysis of cases such as *Massachusetts*, *supra*, and *Evansville-Vanderburgh*, *supra*. If the Harbor Maintenance Tax were a "tax or duty," the fact that it is nondiscriminatory obviously would not save it under this Court's decision in *IBM*. The decision in *IBM*, however, does not even indirectly address the wholly different question presented in this case.

Clause that to confuse fees with "taxes or duties"—as respondent proposes—"would be to confound things essentially different, and which must have been known to be actually different by those who used this language" in adopting the Constitution.

Nothing in *IBM* provides any support for a contention that the term "tax" has a meaning under the Export Clause that could encompass even a properly designed fee that seeks to recover the costs of providing government services to commerce. To the contrary, in describing the concept of a "tax" under the Export Clause, the Court emphasized that that term is to be given its "common" meaning. 116 S. Ct. at 1802. The decision in *IBM* does not address, and certainly does not reject, the holding of *Pace* v. *Burgess*, 92 U.S. at 375, that the government may impose a fee to obtain "compensation * * * for services properly rendered."

There is, in short, no authority for the proposition of respondent that a different test should be applied to distinguish between permissible "fees" and proscribed "taxes" in the Export Clause context than in other contexts. Moreover, contrary to respondent's contention, the United States is not arguing in this case for a "user fee exception" (Resp. Br. 10) to the "strict" prohibitions of the Export Clause. We are simply relying upon the established principle that a *bona fide* user fee that seeks compensation for government services provided to commerce "is in no sense a tax or a duty." *Packet Co.* v. *Keokuk*, 92 U.S. at 84. See also *United States* v. *Sperry Corp.*, 493 U.S. 52 (1989); *Head Money Cases*, 112 U.S. 580 (1884); *Pace v. Burgess*, 92 U.S. at 376 ("proper fees * * * are in no sense a duty on exportation").

3. Respondent contends that the port-use charge imposed by the Harbor Maintenance Tax is a "tax" rather than a "fee" because it is not based upon a "fair approximation of use" and is "excessive in relation to the cost to the government of the benefits conferred" (*Massachusetts* v. *United States*, 435 U.S. at 464). Each of the arguments that respondent raises in support of that contention is incorrect.

a. Respondent initially errs in relying (Resp. Br. 24) on the fact that the word "tax" appears in the name of the statute. The Court has, in analagous contexts, frequently rejected that same formalistic contention. See, *e.g.*, *Fairbank* v. *United States*, 181 U.S. 283, 305 (1901) ("we must always regard things rather than names"); *Cooley* v. *Board of Wardens*, 53 U.S. (12 How.) at 313 ("certainly it is the thing, and not the name, which is to be considered"); Pet. Br. 15 n.5. As this Court stated in the *Head Money Cases*, 112 U.S. at 596, "the act is not void, because, within a loose and more extended sense than was used in the Constitution, it is called a tax."[3]

b. Respondent contends that "the *ad valorem* nature" of the port-use charge makes it more like a tax or duty than a fee (Resp. Br. 36). That contention, however, again misconstrues form for substance. This Court has long made clear that the distinction between a "tax" and a "fee" turns on the character and purpose of the exaction, not its form. A "tax or a

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[3] Respondent incorrectly implies (Resp. Br. 24) that Congress conceived of the Harbor Maintenance Tax as a "tax" rather than a user fee. The legislative history explains, to the contrary, that the charge is not designed "for the purpose of raising revenue. Rather [it is] to repay costs related directly to the servicing of commerce." S. Rep. No. 126, 99th Cong., 1st Sess. 7 (1985); Pet. Br. 15-16.

duty" raises revenue for general purposes; a fee raises money from the beneficiaries of a particular government program or service for the purpose of "defray[ing] the expense" of that service (*Head Money Cases*, 112 U.S. at 596). The fee imposed by the Harbor Maintenance Tax is plainly not designed to enhance the general revenue; its proceeds are committed to a statutory Trust Fund and may be expended only for the purpose of maintaining and operating the Nation's ports. 26 U.S.C. 9505(c); Pet. Br. 15-20. The fact that Congress elected to employ an *ad valorem* methodology to collect this fee does not transmute this port-use charge into a tax. It is "the amount of the tax, not its formula, that is of central concern." *Evansville-Vanderburgh*, 405 U.S. at 716-717.

Ad valorem fees that are designed to compensate the government for the costs of providing special services to commerce have therefore consistently been upheld. *United States* v. *Sperry Corp.*, 493 U.S. at 60-61; Pet. Br. 26-27. In upholding such *ad valorem* charges, the Court has emphasized that there is no requirement of a precise relationship between the benefit received by an individual from the government service and the fee charged to that individual. "Perfect uniformity and perfect equality of taxation * * * is a baseless dream." *Head Money Cases*, 112 U.S. at 595. The requirement that the fee be "based upon some fair approximation of use" requires only a "fair" formula, not an exact one. There is no requirement "that the amount of a user fee * * * be precisely calibrated to the use that a party makes of Government services." *United States* v. *Sperry Corp.*, 493 U.S. at 60.

Respondent contends that *Sperry* is inapposite because, while "the award recipient in *Sperry* benefitted generally in proportion to the size of the award, thus justifying an *ad valorem* assessment, the same cannot be said in the [Harbor Maintenance Tax] context, where the higher value cargo simply does not equate with a higher return" (Resp. Br. 37). This argument misses the point. The harbor maintenance charge applies to the total value of the shipment—a shipper of high-valued cargo pays a lower total fee if the total value of its shipment is less than the total value of a lower-valued shipment. It was not unreasonable for Congress to conclude that the benefit derived from harbor services is proportional to the total value of the goods being shipped. Extensive testimony was presented to Congress that favored the adoption of an *ad valorem* fee over a port-specific fee or a flat tonage fee. See Pet. Br. 27-28. In electing to employ an *ad valorem* fee, Congress acted within "that latitude of discretion which the legislature is entitled to excercise in the selection of the means for attaining a constitutional object" (*Pace* v. *Burgess*, 92 U.S. at 376).

The fact that some *other* method for approximating use could have been adopted—and the possibility that some other method might even more closely "approximate" use by shippers—does not deprive Congress of its legislative discretion to choose among the competing alternatives.[4] As this Court stressed in *United*

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[4] In *Evansville-Vanderburgh*, 405 U.S. at 715-716, the Court noted that a state highway user fee based upon an *ad valorem* charge on motor vehicles had been upheld in *Capitol Greyhound Lines* v. *Brice*, 339 U.S. 542 (1950). The Court stated that such a fee "will pass constitutional muster, even though

States v. *Sperry Corp.*, 493 U.S. at 61, quoting *Massachusetts* v. *United States*, 435 U.S. at 463 n.19, "when the Federal Government applies user charges to a large number of parties, it probably will charge a user more or less than it would under a perfect user-fee system, but we decline[] to impose a requirement that the Government 'give weight to every factor affecting appropriate compensation * * * .'"[5]

c. Respondent errs in contending (Resp. Br. 38-39) that a valid port-use fee must be based upon the separate cost structure of each separate port of the United States. The Court rejected an indistinguishable contention in *Massachusetts* v. *United States*, 435 U.S. at 468. In upholding a nationally-uniform federal charge for the use of airports, the Court stated that, even though the fee (*ibid.*)

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some other formula might reflect more exactly the relative use of the state facilities by individual users." 405 U.S. at 717.

[5] Respondent contends that, even if the Harbor Maintenance Tax otherwise qualifies as a valid "fee" on the use of the ports of the United States, it should be held to be unconstitutional simply because, as an *ad valorem* charge, it is similar in form to an export duty (Resp. Br. 26). That contention, however, fails to acknowledge that the form of the exaction is not controlling. In upholding a state-imposed charge for port services against a claim that the fee violated the Tonnage Clause of the Constitution, the Court held that this constitutional restriction on taxation does "not extend to charges made by state authority, *even though graduated according to tonnage*, for services rendered to and enjoyed by the vessel" (*Clyde Mallory Lines* v. *Alabama*, 296 U.S. at 266 (emphasis added)). In any event, the port-use charge imposed by the Harbor Maintenance Tax is not a "duty" even in form, for (i) it does not seek to raise general revenues for the benefit of the public and (ii) it must be paid by domestic as well as international users of the Nation's ports. The port-use fee merely requires *all* commerce to pay its own way.

> does not, of course, give weight to every factor affecting appropriate compensation for airport and airway use * * * the present scheme nevertheless is a fair approximation of the cost of the benefits each aircraft receives. Every aircraft that flies in the navigable airspace of the United States has available to it the navigational assistance and other special services supplied by the United States. And even those aircraft * * * that have never received specific services from the National Government benefit from them in the sense that the services are available for their use if needed and in that the provision of the services makes the airways safer for all users.

Respondent attempts to distinguish that decision by arguing that the civil aviation services at issue in that case were part of an "integrated national airsystem" while "[h]arbor services, by their very nature, are more location-specific" (Resp. Br. 38).[6] Although the system of ports and harbors may not be as pervasively integrated as civil aviation, the national water-

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[6] Respondent suggests that an exporter who ships from Miami gains no benefit from dredging services in Oregon (Resp. Br. 38). The same sort of extreme contention could, of course, have been made in *Massachusetts* about an exporter who ships by air from Miami. As the Court recognized in *Massachusetts*, however, such fact-specific hypotheticals understate the degree of integration of national systems of transportation. For example, a Pennsylvania shipper may ship exclusively through the port of New York. It nevertheless benefits from dredging operations at other ports because if those ports were not properly maintained, other shippers might divert their business to New York, placing a greater burden upon that port and resulting in higher costs or delays for the Pennsylvania shipper.

ways are unquestionably an integrated system of transportation. The fact that a shipper may elect to use one port today does not preclude it from using a different port in the future. All ports "are available for their use if needed" (*Massachusetts* v. *United States*, 435 U.S. at 468). Congress reasonably gave account to "the benefits provided by an interconnected system of freight transportation to all exporters" (Oregon Am. Br. 6) in selecting a nationally uniform fee.[7]

d. Respondent asserts (Resp. Br. 40) that the harbor maintenance fee is invalid because it is imposed on shippers rather than vessel owners. This Court squarely rejected that exact contention in *Evansville-Vanderburgh*, 405 U.S. at 714. See Pet. Br. 22. Respondent fails to cite or discuss that controlling authority in arguing to the contrary in its brief.

e. Finally, respondent contends that the harbor maintenance fee is unconstitutional because it is "excessive in relation to the federal costs of harbor maintenance" (Resp. Br. 42). Respondent bases this contention not on the situation that obtained when the payments at issue in this refund suit were made, but rather on the size of the current surplus that has

---

[7] In upholding the nationally uniform airport fee in *Massachusetts* v. *United States*, 435 U.S. at 469 n.23, the Court explained that:

> The analogous decision is *Clyde Mallory Lines* v. *Alabama ex rel. State Docks Comm'n*, 296 U.S. 261 (1935), in which the Court held that a vessel that has not been the recipient of any police services could be required to pay a charge designed to defray their costs since the services redounded to the benefit of all vessels in the port.

since developed in the Trust Fund that Congress established for the collection and disbursement of the harbor maintenance fee. In rejecting the contention that such a surplus makes an otherwise constitutional fee invalid, the Court stated in *Massachusetts* v. *United States*, 435 U.S. at 470 n.25, that "a surplus of revenue over outlays in any one year can be offset against actual deficits of past years and perhaps against projected deficits of future years." This long-term view of appropriate funding is necessitated by the great expense and unpredictability of transportations needs. Congress appropriately "factor[s] in future development plans when setting user fees." *Alamo Rent-A-Car, Inc.* v. *Sarasota-Manatee Airport Authority*, 906 F.2d 516, 522 (11th Cir. 1990), cert. denied, 498 U.S. 1120 (1991).

If the fees collected were to become irreconcilable with the amounts ultimately to be expended from the Trust Fund, some adjustment of the rate of the fee or the services provided could ultimately become necessary. That determination is, of course, initially committed to Congress and proposals for reducing the rate of the Harbor Maintenance Tax or for adding navigation projects to be funded by the Trust have been submitted for its consideration. See Pet. Br. 18 n.8. On the record of this case, however, there is no evidence of any such permanent imbalance. During the years that the challenged fees were collected in this case, the surplus in the Trust Fund was less than the annual expenditures from the Fund. See *ibid.*; J.A. 104.

This is thus not a case in which the revenues collected exceeded the costs of services so greatly that the fee resembles the "imposition of a duty under the pretext of fixing a fee" (*Pace* v. *Burgess*, 92 U.S. at

376). The fees collected are impressed with a trust and may not be expended at any time for any purpose other than the operation and maintenance of harbor and port facilities. See Pet. Br. 19. The government has not "appropriated all, or most, of the award to itself and labeled the booty as a user fee." *United States* v. *Sperry Corp.*, 493 U.S. at 62. The fact that the Trust Fund ensures that the harbor maintenance fees are used only to fund the specific services for which the charge is assessed reflects that this charge is a valid "fee" for "services properly rendered" (*Pace* v. *Burgess*, 92 U.S. at 375). See, *e.g.*, *United States* v. *Sperry Corp.*, 493 U.S. at 62; *Head Money Cases*, 112 U.S. at 596.[8]

* * * * *

[8] Amicus curiae Arctic Cat contends that the Court of International Trade lacked jurisdiction over this case and that jurisdiction instead lies exclusively in the Court of Federal Claims. In making that assertion, however, the *amicus* did not address (Am. Arctic Cat Br. 9) the jurisdiction of the Court of International Trade under 28 U.S.C. 1581(a). The United States has consistently taken the position that jurisdiction exists in the Court of International Trade under that provision, rather than under 28 U.S.C. 1581(i). See Pet. App. 8a-9a; Pet. Br. 7-8 n.3. Whether jurisdiction is premised on subsection (a) or subsection (i), however, the Court of International Trade had jurisdiction to hear the present suit. Congress plainly intended this result, for the legislative history specifies that "the Court of International Trade is to have primary jurisdiction for actions involving the port user charge provisions" of the Harbor Maintenance Tax. S. Rep. No. 228, 99th Cong., 1st Sess. 10 (1985).

For the foregoing reasons and those stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

FEBRUARY 1998

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No. 97-372

In the
Supreme Court of the United States
October Term, 1997

United States of America,

Petitioner,

v.

United States Shoe Corporation,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MOTION AND BRIEF OF ARCTIC CAT, ET AL. AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY AND SUGGESTING LACK OF JURISDICTION

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MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

This motion is made under Rule 37.3(b) of the Rules of the Supreme Court for leave to file an amicus curiae brief on behalf of Arctic Cat, Inc., BMC Industries, Inc., Carver Boat Corporation, Genmar Industries, Inc., HUFCOR, Inc., Lamex Foods Inc., Miller Waste Mills, Incorporated, Napco International, Inc., Prima Corporation, Spuhl Anderson Machine, Kerry Ingredients, Wellcraft Marine Corp., and MTS Systems Corporation addressing the issue of subject matter jurisdiction of the Court of International Trade. A request has been made to all parties before the Court for oral argument for leave to file the amicus curiae brief. The United States through its Solicitor General, the Honorable Seth P. Waxman, has consented by letter dated November 24, 1997. However, United States Shoe Corporation has not consented. By letter from Brian S. Goldstein, Esq., dated December 11, 1997, consent was denied.[1]

Each of the amici listed above have filed a claim in the United States Court of Federal Claims seeking a refund of money paid under the Harbor Maintenance Tax. Under the lower court decisions, exclusive jurisdiction to hear claims involving Harbor Maintenance Tax payments made on exports was found to exist before the Court of International Trade. The jurisdictional issue is of practical importance because of the differing statute of limitations provisions governing

---

[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, the parties submitting this brief state that neither counsel for the United States nor counsel for United States Shoe Corporation in any way authored this brief, either in whole or in part, and no other person or entity, other than the amici curiae or their counsel made a monetary contribution to the preparation or submission of the brief.

matters commenced before the Court of Federal Claims as opposed to those before the Court of International Trade.

Because the parties before the Court have agreed that jurisdiction below was proper, the issue of subject matter jurisdiction will likely not be adequately addressed by either party. Therefore, an amici brief on that issue is appropriate and in compliance with the Rules of this Court. Accordingly, amici respectfully request that the Court grant them leave to file the accompanying brief on this issue of subject matter jurisdiction.

INTEREST OF *AMICI CURIAE*

Arctic Cat, Inc., BMC Industries, Inc., Carver Boat Corporation, Genmar Industries, Inc., HUFCOR, Inc., Lamex Foods Inc., Miller Waste Mills, Incorporated, Napco International, Inc., Prima Corporation, Spuhl Anderson Machine, Kerry Ingredients, Wellcraft Marine Corp., and MTS Systems Corporation file this brief as amici curiae addressing the issue of subject matter jurisdiction and not in support of either party now before the Court.

Each amici has paid the Harbor Maintenance Tax 26 U.S.C. § 4461 ("HMT") on exports. They have all filed a claim in the United States Court of Federal Claims ("CFC") under the Tucker Act, 28 U.S.C. § 1491(a)(1), seeking a refund of money paid under the HMT, alleging that the tax as applied to exports is unconstitutional as violative of the Export Clause of the United States Constitution. U.S. Const. Art. I § 9, cl.5. All amici refund cases have been stayed pending resolution of this litigation. With the exception of the forum in which their respective claims have been asserted, amici are similarly situated to United States Shoe Corporation. The jurisdictional issue, and thus the determination of which court has the authority to decide these kinds of claims, has a

significant practical affect on the amounts of claims which are recoverable, assuming that the HMT is ultimately declared unconstitutional. Cases in the Court of International Trade ("CIT") are subject to statute of limitations provisions under 28 U.S.C. § 2636. The longest of those, under subsection (i), is two years. In contrast, the limitations period for actions commenced before the CFC is six years. 28 U.S.C. § 2501. As a consequence, amici (and all other claimants similarly situated[2]) will be subject to the assertion of a bar of all claims for periods beyond two years if this Court affirms the lower court's holding regarding CIT jurisdiction over claims arising out of the HMT.

SUMMARY OF ARGUMENT

The argument of amici is that subject matter jurisdiction over claims arising out of HMT as applied to exports are properly before the CFC under the Tucker Act, 28 U.S.C. § 1491(a)(1), not the CIT under 28 U.S.C. § 1581(i). The lower courts' holding of jurisdiction under 28 U.S.C. § 1581(i) is incorrect, in that they ignore the plain language of 28 U.S.C. § 1581(i) and this Court's prior decision on jurisdictional limits of the CIT. Further, having erred in finding jurisdiction of the CIT, the courts erred in not transferring the case to the CFC under 28 U.S.C. § 1631.

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[2] The exact number of taxpayers who have paid the HMT on exports is not reflected in the opinions of the lower courts, but in the class action submissions in Baxter Healthcare Corp. v. United States, 925 F. Supp. 794 (Ct. Int'l Trade 1996), the number of 100,000 taxpayers was submitted.

ARGUMENT

The exclusive jurisdictional basis for a constitutional challenge to a levy under the HMT on an export are the Tucker Acts.[3] Nonetheless, neither court below -- and none of the parties to the proceedings before those courts -- even addressed the Tucker Acts. Instead, in both lower courts, the parties' arguments exclusively revolved around which subsection of 28 U.S.C. § 1581 ought to apply to these claims, subsection (a)[4] or subsection (i).[5] Neither party questioned whether § 1581 applied at all; as the CIT stated in its decision: "[The parties] also agree that the court has subject matter jurisdiction to determine the constitutionality of the Tax." United States Shoe Corp. v. United States, 907 F. Supp. 408, 410 (Ct. Int'l Trade 1995).

It is axiomatic that parties to a lawsuit may not merely by agreement convey jurisdiction to a court. As this Court stated nearly sixty years ago, "[t]he jurisdiction of the federal courts -- their power to adjudicate -- is a grant of authority to them by Congress and thus beyond the scope of litigants to confer." Neirbo Co. v. Bethlehem Shipbuilding Corp., 308 U.S. 165, 167 (1939). Not only can parties not confer jurisdiction on a court, this Court has the self-imposed "obligation to consider the question sua sponte." Andrus v. Charlestone Stone Prod. Co., 436 U.S. 604, 607 n.6 (1978). Amici respectfully urge the Court to carefully review the issue of subject matter jurisdiction in this matter, an issue which will likely be given little or no attention by the parties in light of the shift of position enunciated by the United States in its certiorari petition to the Court. See Petition for a Writ of Certiorari at 7 n.2 (indicating that the United States was not challenging the Court of Appeals holding on jurisdiction because it had determined that the issue was irrelevant to the disposition of the present matter given its procedural posture).

---

[3] Amici have brought their claims before the CFC. There is a little Tucker Act under 28 U.S.C. § 1346(a)(2) where concurrent jurisdiction for claims not exceeding $10,000 can be brought. Subsequent references and discussion will only deal with the Tucker Act under 28 U.S.C. § 1491(a)(1).

[4] "The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to contest the denial of a protest, in whole or in part, under section 515 of the Tariff Act of 1930." 28 U.S.C. § 1581(a).

[5] "In addition to the jurisdiction conferred upon the Court of International Trade by subsections (a) - (h) of this section and subject to the exception set forth in subsection (j) of this section, the Court of International Trade shall have exclusive jurisdiction of any civil action commenced against the United States, its agencies, or its officers, that arises out of any law of the United States providing for --

(1) revenue from imports or tonnage;
(2) tariffs, duties, fees, or other taxes on the importation of merchandise for reasons other than the raising of revenue;
(3) embargoes or other quantitative restrictions on the importation of merchandise for reasons other than the protection of the public health or safety; or
(4) administration and enforcement with respect to the matters referred to in paragraphs (1)-(3) of this subsection and subsections (a)-(h) of this section . . ..

* * * *"

28 U.S.C. § 1581(i).

1. The CIT Lacked Subject Matter Jurisdiction to Consider United States Shoe Corporation's Claim.

The subject matter jurisdictional statute at issue here is 28 U.S.C.§ 1581. This Court has had one occasion to address this statute. In K Mart Corp. v. Cartier, Inc., 485 U.S. 186, 188 (1988), this Court stated:

> Congress intended, first and foremost, to remedy the confusion over the division of jurisdiction between the Customs Court (now the Court of International Trade) and the district courts and to "ensure . . . uniformity in judicial decision-making process." * * * But Congress did not commit to the Court of International Trade's exclusive jurisdiction every suit against the Government challenging customs-related laws and regulations. Had Congress wished to do so, it could have expressed such an intent much more clearly and simply * * *.

(Citations omitted, emphasis in the original). The clear direction of K Mart is that the jurisdiction of the CIT is limited to the precise areas identified in 28 U.S.C. § 1581. If the issue presented falls outside of those specific areas, the court lacks subject matter jurisdiction.

The lower courts' decisions in United States Shoe Corporation reveal that there was an expansive treatment of CIT jurisdiction based on the general finding that the HMT was a custom-related law. The decisions were not only contrary to the direction of K Mart for limited jurisdiction of the CIT, but were premised specifically upon a misreading of 26 U.S.C. § 4462(f)(2) regarding jurisdiction of courts over HMT matters.

The CIT stated:

> Congress has given the Court of International Trade jurisdiction over matters arising out of the Tax: "For purposes of determining the jurisdiction of any court of the United States or any agency of the United States, the tax imposed by this subchapter shall be treated as if such tax were a customs duty." 26 U.S.C. § 4462(f)(2). This language directs that taxes imposed upon both imports and exports shall be treated as if they were customs duties, in other words, as import transactions.

United States Shoe Corporation v. United States, 907 F. Supp. 408, 410 (Ct. Int'l Trade 1995).

Similarly, the United States Court of Appeals for the Federal Circuit stated:

> Congress expressly directed that for jurisdictional, administrative and enforcement purposes, the HMT was deemed to be a customs duty. Thus, it is beyond dispute that Congress intended the Court of International Trade to have jurisdiction over disputes regarding the HMT, as the Court of International Trade has exclusive jurisdiction over customs matters.

United States Shoe Corporation v. United States, 114 F.3d 1564, 1571 (Fed. Cir. 1997).

Both courts construed the term "custom duty" to mean only a tax on import transactions. It is not difficult to understand why, in a constitutional system which prohibits taxes on exports, that the complete meaning of the term would be overlooked. Last term in United States v. IBM, __U.S.__,

116 S.Ct. 1793 (1996), Justice Kennedy reviewed the history of taxes on exports as it related to debate over the Export Clause, __U.S. at __, 116 S.Ct. at 1809-1810. The fact that the Export Clause was adopted does not change the meaning of the term custom duties. This Court observed almost 150 years ago "[c]ustoms are duties charged upon commodities on their being imported into or exported from a country," Marriott v. Brune, 50 U.S., 619, 632 (1850). "Custom duties "is the name given to taxes on the importation and exportation of commodities. 25 C.J.S. Custom Duties § 1. Primary sources existing at the time of the enactment of the HMT such as Webster's New Collegiate Dictionary continue to define "customs" as "duties, tolls, or imposts imposed by the sovereign law of a country on imports or exports." Webster's New Collegiate Dictionary 318 (9th Ed. 1995).

Because the lower courts' definition of custom duties is incorrect, the analysis which was made of the CIT's jurisdiction was flawed. The proper analysis of what court has jurisdiction will depend on what is being taxed. The HMT applies to imports, exports and passengers. In this case, the proper question under § 4462(f)(2) is what court has jurisdiction over the HMT when the tax is on an export?

Certainly § 4462(f)(2) could have been drafted to unequivocally grant jurisdiction to one court to the exclusion of others, but it was not. There is no statutory provision in the HMT defining custom duty in the way the lower courts did (custom duty means only import transactions). Nor does legislative history[6] contain a definition of the term custom duty

[6] Reference was made in both lower court decisions to the legislative history as supporting a determination of jurisdiction in the CIT of HMT matters. The legislative history referred to was H. Rep. No. 99. No. 99-228 at 10 (1986) reprinted in 1986 U.S.C.C.A.N. §§ 6705, 6715 which stated:

which limits its meaning to imports only. To determine the court with authority to hear an export matter, the specific jurisdictional statute must be applied.

In applying the CIT's jurisdictional statute 28 U.S.C. § 1581, only two subsections were considered by the lower courts -- subsection (a) or (i). Both courts were correct in their holding that subsection (a) does not apply. Amici will not repeat that discussion here since neither court based its finding of jurisdiction upon that portion of the statute. With respect to the application of subsection (i), the United States properly asserted that it simply makes no sense to attack a tax on exports in a court which has exclusive jurisdiction over laws relating to imports. The government below argued:

> While a constitutional challenge to a fee imposed upon exports might not fit neatly within subsection 1581(a), it does not fit within subsection 1581(i) at all. * * *
>
> By its own terms, subsection 1581(i) provides jurisdiction only regarding imports not exports. The lower court evaded this obvious barrier by reasoning that (1) Congress intended the HMT to be treated

> The committee amendment provides that for purposes of determining the jurisdiction of United States courts and agencies, the port user charges are to be treated as custom duties. Thus, the Court of International Trade is to have primary jurisdiction for actions involving the port user charge provisions.

Here again the term custom duty is used without reference to imports or exports. As such, it adds nothing to an understanding of § 4462(f)(2). In addition, the reference to primary jurisdiction of the CIT only adds uncertainty where 28 U.S.C. 1581 speaks of exclusive jurisdiction.

> like a "duty"; (2) "duties" apply to imports; and (3) therefore, the HMT should be considered a "duty" upon "imports" for purposes of establishing jurisdiction under § 1581(i) even when the challenge involves only exports. This reasoning is absurd on its face;...

Brief of the United States before the United States Court of Appeals for the Federal Circuit at p. 20. In its Reply Brief, the Government further stated:

> Finally, plaintiff's attempt to shoehorn this case into provisions of § 1581(i), which, as we demonstrated in our main brief, is clearly inapplicable to constitutional challenges to the HMT as applied to exporters.
>
> While denying that they are engaged in jurisdictional gymnastics, appellees and amici (1) admit that section 1581(i) on its face does not apply to exports; (2) note that section 1581(i) does apply to any "law of the United States providing for revenue from imports"; and (3) reason that, because the HMT applies to importers as well as exporters, section 1581(i) can be invoked to consider a constitutional challenge to the HMT only as applied to exporters.
>
> This reasoning, as we pointed out in our main brief, is plainly absurd. Under this view, any type of challenge to any provision of the sweeping Water Resources Development Act, could be brought in the CIT because that Act is a "law of the United States" providing for revenue from imports. This interpretation would dramatically expand the CIT's

> jurisdiction from a specialized court with exclusive jurisdiction to entertain specific types of international trade disputes into a court of virtually general jurisdiction.

Reply Brief of the United States before the United States Court of Appeals for the Federal Circuit at pp. 9-10. The United States' assessment below of the assertion that 28 U.S.C. § 1581(i) does not provide jurisdiction over this matter was absolutely correct. That assessment, taken in conjunction with the government's acknowledgment that the case did not fit within the parameters of subsection (a) compels the conclusion that there was no jurisdiction at all in the CIT over this custom related (export) dispute.

Prior to its United States Shoe Corp. decision, the Federal Circuit had cited K Mart in discussing the limitations regarding the CIT's jurisdiction in Trayco, Inc. v. United States, 994 F.2d 832 (Fed. Cir. 1993). The specific jurisdictional statute was 28 U.S.C. § 1582. In considering it, the court stated:

> [I]t is also well settled that the Court of International Trade, like other specialized courts, "operates within precise and narrow jurisdictional limits" granted by Congress. * * * Despite the fact that the Customs Courts Act of 1980 broadened the exclusive jurisdiction of the Court of International Trade, it cannot exercise jurisdiction over actions not addressed by a specific jurisdictional grant.

Trayco, Inc. v. United States, 994 F.2d at 836 (citation omitted). The Federal Circuit stated later in Trayco "Congress did not fully explain, and neither can we, why certain customs-related matters are excluded from the jurisdiction of the Court

of International Trade." Trayco, 994 F.2d at 837, citing K Mart, 485 U.S. at 189.

In fact, as to a custom related export tax, it is easy to understand why in 1980 when the jurisdictional statutes for the CIT were enacted, there were no provisions related to exports. Direct taxes on exports did not exist at that time and it was not until the enactment of the HMT six years later that such an export related tax came into existence. Against this background, it is not surprising that nowhere in enabling legislation for the CIT is there any mention of jurisdiction over exports.

2. The Tucker Act, 28 U.S.C. § 1491, Confers Jurisdiction Over this Claim on the United States Court of Federal Claims

Absent such jurisdictional authority in the CIT, the proper court with jurisdiction for recovery of HMT amounts paid on exports is the CFC. The Tucker Act confers jurisdiction over such disputes. It states:

> The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort.

28 U.S.C. § 1491(a)(1). Claims for money paid, exacted or taken in contravention of the Constitution are cognizable in the CFC. See Eastport S.S. Corp. v. United States, 372 F.2d 1002, 1007 (Ct. Cl. 1967). The CFC would lack jurisdiction

only if the CIT was granted exclusive jurisdiction, 28 U.S.C. 1491(c), or upon a clear congressional statement of an intent to withdraw the remedy under the Tucker Act. See Blanchette v. Connecticut Gen. Ins. Corps., 419 U.S. 102, 126-27 (1974). As noted above, Congress did not grant exclusive jurisdiction over all matters involving the HMT to the CIT. Without a showing that the Tucker Act remedy is withdrawn, the Tucker Act is clearly available to HMT export taxpayers who have paid a tax which is unconstitutional under the Export Clause.

CONCLUSION

For the reasons stated above, this Court should determine that jurisdiction over claims for refunds of HMT payments on exports does not come within the specific provision of 28 U.S.C. § 1581 and that jurisdiction lies under the Tucker Act. Leave should be given to claimants who have filed with the CIT to transfer those cases under 28 U.S.C. § 1631.

Dated: December 15, 1997

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES SHOE CORPORATION,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Federal Circuit

BRIEF OF AMICUS CURIAE STATE OF OREGON

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QUESTION PRESENTED

Whether application of the Harbor Maintenance Tax (26 U.S.C. 4461(a)) to goods loaded at ports of the United States for export shipment violates the Export Clause of the Constitution.

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INTEREST OF AMICUS CURIAE

In recent years, Oregon, like much of the rest of the nation, has become deeply involved in what is now commonly referred to as the "global economy." In only five years, for example, Oregon's exports of high technology products increased over 190 percent.[1] In the same period, exports of agricultural products increased more than 70 percent.[2] A large variety of other products, ranging from leather goods and textiles to transportation equipment and "second hand goods," all registered significant export increases.[3] Because of its proximity, the Port of Portland on the Columbia River is the logical choice for most Oregon exporters to get their products to foreign markets. Others, however, find it more convenient, more economical or both to use ports in neighboring states. Similarly, exporters from other states are regular customers of the Port of Portland.

This movement of goods contributes to the economic development of the State of Oregon and to the prosperity of its people. None of it, however, happens in isolation. Congress has recognized that most freight is transported over an "intermodal" national system. That is, freight moves to market by use of a combination of transportation methods, perhaps leaving the factory by truck, traveling cross country by rail and being shipped overseas by water. The nation's ports are the termini of that national, intermodal freight transportation system. The overwhelming majority of Oregon's and the nation's foreign trade moves through those ports. Changing and developing markets, movement of manufacturing operations, mergers and other changes in various components of the freight transportation

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[1] TRADE STATS NORTHWEST, OREGON'S EXPORT TRADE WITH THE WORLD 3 (1997) (reporting increase from 1991 through 1996).

[2] *Ibid.*

[3] *Id.* at 5.

system and even natural disasters can slowly or suddenly transform the needs of exporters, making yesterday's transport solution today's bottleneck. To ensure their ability to compete, the nation's exporters, including those in Oregon, depend on the availability of a flexible network of road, rail, air and water transportation and a "menu" of ports that allows them to select the route that gets their products overseas in the most efficient and economical manner and to change their transportation strategy as needs and conditions change. The health of the ports, an essential link in the national freight transportation system, is, therefore, of vital importance to Oregon's continued economic development. Because the Harbor Maintenance Tax contributes significantly to the federal government's ability to maintain those ports, its continuation is a matter of serious concern for the State of Oregon.

STATEMENT OF THE CASE

Oregon adopts the Statement of the Case in the Petition for Certiorari filed by the United States.

SUMMARY OF ARGUMENT

It is beyond dispute that Congress may impose on exports a fee to recover federal funds expended to maintain the nation's ports. The question presented here is whether the method Congress chose to apportion that fee among those who use the ports transforms the fee into a general revenue measure forbidden by the Export Clause. The court of appeals' conclusion that the chosen method makes the fee into a tax is based in part on an atomistic view of the national freight transportation system in which each load of freight exported may be required to pay fees to maintain only the particular port from which it is in fact shipped. Not only is that analysis based upon a misinterpretation of this Court's cases, it is also based upon a misunderstanding of

the nature and operation of the national freight transportation system.

That a fee is collected at one facility and used to maintain another facility of the same type has never been a valid objection to that fee. Especially in the area of transportation, this Court has recognized that the benefit that flows from the fee is not the creation or maintenance of the specific facility at which it is paid, but the availability of the system of which that individual facility is a part. A majority of the nation's foreign trade passes through the nation's ports. As the developing nature of the global economy suggests and as the recent events illustrate, those who use one port today may require the services of a different port tomorrow. It is against the overall availability of the nation's ports that the benefits flowing from the port use charge must be measured.

ARGUMENT

Even in those contexts in which Congress is forbidden to impose taxes, it may require those who benefit from the use of federally supported facilities to pay the costs the federal government incurs in creating or maintaining those facilities. *Massachusetts v. United States*, 435 U.S. 444 (1978). As a result, even though Congress may not impose a tax or duty on exports, U.S. Const. Art. I, § 9, Cl. 5, it may impose fees to recover costs it incurs in creating or maintaining the facilities through which those exports flow. *Pace v. Burgess*, 92 U.S. 372 (1876). Here, the government incurs costs for the maintenance of the nation's harbors. That it may recover those costs, therefore, should not be open to dispute. The question is from whom and by what formula.

The distinction between a permissible fee and an impermissible tax is revealed by a three-part test. A permissible fee (1)

does not discriminate against constitutionally protected interests or activities, (2) is based upon a fair approximation of use and (3) is not excessive in relation to the costs incurred by the government in providing the service in question. *Massachusetts v. United States*, 435 U.S. at 464; *Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707, 716–20 (1972). The Federal Circuit concluded that the port use charge is not based upon a fair approximation of use. *United States Shoe Corp. v. United States*, 114 F.3d 1564, 1574 (Fed. Cir. 1997).

The court gave three reasons for that conclusion. First, the court noted that the tax is imposed on the exporter, whom the court described as an "indirect user," rather than the ship owner, whom the court characterized as "the direct user." 114 F.3d at 1573. Second, because the charge is calculated based on the value of the exported goods, the court determined that the benefit received is not tied closely enough to the amount of the charge paid. *Id.* at 1572–74. Finally, the court noted that exporters are forced to pay for harbor maintenance "across the entire country, even though they receive no benefit from maintained harbors at any port other than the one they actually use." *Id.* at 1574. Although this brief is addressed primarily to the last of these reasons, each is demonstrably flawed.

1. As the dissenting opinion explained, the majority's first reason is faulty as a matter of the practical economics of the marketplace. 114 F.3d at 1581–82 (Mayer, J., dissenting). This Court has implicitly recognized that, notwithstanding the entity to which the law imposes the fee, it is likely that it will actually be paid by the consumer of the transportation services. Thus, the Court did not "think it particularly important whether the charge is imposed on the passenger himself, to be collected by the airline, or on the airline, to be passed on to the passenger if it

chooses." *Evansville-Vanderburgh*, 405 U.S. at 714. In the *Head Money Cases* (*Edye v. Robinson*), 112 U.S. 580 (1884), the fee was collected from the ship operator rather than the passengers, the "direct" beneficiaries of the fee. The Court nevertheless found that Congress was not exercising the taxing power. *Id.* at 595–96.[4] Here, if the fee were imposed directly on the ship owners, they would be free to pass it along to the exporters. It is difficult to see the constitutional significance in the congressional choice to impose it directly on the exporters, a choice consistent with this Court's express pronouncement in *Evansville-Vanderburgh*.

2. This Court has also rejected the second basis of the majority's reasoning, that the fee is faulty because it is not calculated by a method that, in the court of appeals' view, closely enough approximates the benefits realized by those who pay it. In *Massachusetts v. United States*, for example, the Court considered a "registration tax" on all civil aircraft to recoup the cost of federal aviation programs. 435 U.S. at 446. The Court explained that Massachusetts' argument that the tax in that case was "not directly related to the degree of use of the airways," "has been confronted and rejected in analogous contexts." 435 U.S. at 463 citing *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950). In *Massachusetts v. United States* itself, the Court rejected an intergovernmental tax immunity challenge to the application of the registration charge to a state-owned helicopter even though "a probable deficiency in the formula arises because not all aircraft make equal use of the federal navigational

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[4]The Court, somewhat obliquely, acknowledged the ability of the ship owner to pass the fee on to the passengers, noting that although the fee did not protect the ship owner, "[h]e is the man who reaps the profit from the transaction, who has the means to protect himself and knows well how to do it[.]" 112 U.S. at 595.

facilities or the airports that have been planned or constructed with federal assistance." 435 U.S. at 468. In other words, the fee did not fail the fair apportionment test even though the fee was not directly calculated upon the specific benefit realized by the aircraft's owners and might result in some paying more and others less, in relation to benefit received, than some other method of calculating the charge. Basing the fees on the value of the product exported is hardly "wholly irrational as a measure of the relative use of the facilities for whose benefit they are levied." *Evansville-Vanderburgh*, 405 U.S. at 719.

3. It is on the third leg of the court of appeals' reasoning, however, that Oregon wishes to concentrate. The court complained that the fees were used for the maintenance of all harbors, not just the one from which the cargo in question was actually shipped. *United States Shoe Corp.*, 114 F.3d at 1574. The court did not explain precisely why this aspect of the charge was a defect in respect to the test this Court has applied. Nothing in *Massachusetts v. United States* suggests that the Court had concluded that fees collected at a particular airport could be used to maintain only that airport. To the contrary, the Court explained that the availability of the services paid for by the fee benefits all potential users. 435 U.S. at 468 and n. 23. Nor is there any suggestion in the *Head Money Cases* that the charge paid by an individual shipping line could be used only to provide aid to the immigrants transported by that line. Here, as Judge Mayer explained, all exporters have all ports available to them. *United States Shoe Corp.*, 114 F.3d at 1581 (Mayer, J., dissenting).

Even if the court of appeals' focus were not too narrow legally, it is too narrow factually. The requirement, implicit in the court's reasoning, that a fee collected at one port never be used to maintain a different one takes no account of the benefits

provided by an interconnected system of freight transportation to all exporters. As the national economy has become more integrated into and dependent upon the worldwide marketplace, imports and exports alike have increased dramatically. The total value of the nation's waterborne foreign trade increased by over one hundred and sixty-one billion dollars between 1990 and 1995, a jump of over thirty-five percent. MARITIME ADMINISTRATION OFFICE OF PORTS AND DOMESTIC SHIPPING, UNITED STATES DEPARTMENT OF TRANSPORTATION, A REPORT TO CONGRESS ON THE STATUS OF THE PUBLIC PORTS OF THE UNITED STATES 1994 – 1995 Table 8 (1996) (hereinafter PUBLIC PORTS). Exports accounted for almost seventy billion dollars of that increase, representing growth of over forty-four percent. *Ibid.* Considered in sheer volume, rather than value, exports expanded by almost seventy million metric tons, over twenty percent, between 1994 and 1995 alone. *Ibid.* The overwhelming bulk of that foreign trade, ninety-five percent by volume, moves through the nation's port system. *Id.* at 60. And, foreign trade is expected to double in little more than a decade. *Ibid.*

These rapid increases have exposed significant weaknesses in the national freight transportation system. "[A]ccess to many port terminals in terms of navigation channels, and road and rail links has not kept pace" with the growth in the volume of freight or with improvements in port terminal facilities. PUBLIC PORTS 62. The result is "bottlenecks in the landside transportation system serving the ports." TRANSPORTATION RESEARCH BOARD, NATIONAL RESEARCH COUNCIL, LANDSIDE ACCESS TO U.S. PORTS 1 (1993) (hereinafter LANDSIDE ACCESS). "The transfer of cargo between ports and inland transport is one of the weakest, least efficient, and most costly links in the intermodal transportation chain." *Id.* at 143. Modern cargo vessels are

expensive to operate.[5] Delays in loading or unloading are, therefore, costly. LANDSIDE ACCESS at 41–42.

Congress has expressed its concern about weak linkage between ports and land transportation and has called for a national response. Acknowledging the need to improve the nation's ability to compete in "the global economy," Congress has declared the nation's policy to develop a "National Intermodal Transportation System [that] shall provide improved access to ports and airports, the Nation's link to world commerce." Intermodal Surface Transportation Efficiency Act of 1991, § 2, Pub. L. No. 102-240, 105 Stat. 1914 (hereinafter ISTEA). That national intermodal transportation system includes "all forms of transportation in a unified, interconnected manner[.]" *Ibid.*[6]

Infrastructure weakness is not the only source of delay and consequent expense for exporters. Both long and short term considerations may overtax existing facilities. Containerization and economies of scale, among other factors, have tended to concentrate cargo at fewer terminals. LANDSIDE ACCESS 42. In the long term, those terminals may not have the capacity to meet all the demands their success has created, making it necessary for cargo to move to other facilities to find available port

[5]Container ships can cost as much as $50,000 as day to operate. Bill Mongelluzzo, *Big Jams Cause Cargo Diversion at Los Angeles*, JOURNAL OF COMMERCE, Oct. 29, 1997, at 1A.

[6]Responding both to bottlenecks and the fluid needs of modern business in an international economy, ISTEA envisions "an integrated, closely coordinated system, providing 'seamless' multimodal service for both passengers and freight." Dr. Mark A. Turnquist and Dr. George F. List, *Charting a Course for Intermodal Policy and Research*, 47 TRANSPORTATION QUARTERLY 257, 258 (1993). In that "seamless" system, freight would move much like a letter or a telephone call, choosing whichever means of transportation and route are most efficient and economical at the moment the shipment is ready to move rather than moving over a predetermined course. *Id.* at 267–69.

capacity. *Ibid.* A short term example is provided by the extensive delays in loading and unloading ships caused by the recent shortages of labor and railcars at the Ports of Los Angeles and Long Beach, which normally handle about twenty-five percent of the nation's ocean-going container traffic. Bill Mongelluzzo, *Big Jams Cause Cargo Diversion at Los Angeles*, JOURNAL OF COMMERCE, Oct. 29, 1997, at 1A (hereinafter *Big Jams*); Steve Hayes, *Anxious Shippers Divert Containers*, THE OREGONIAN, November 4, 1997, at D1 (hereinafter *Anxious Shippers*). Other factors, such as market shifts or changes in commodity prices, may make it more profitable to obtain supplies or suppliers from new locations. *See* Dr. Mark A. Turnquist and Dr. George F. List, *Charting a Course for Intermodal Policy and Research*, 47 TRANSPORTATION QUARTERLY 257, 266 (1993).

As one method of transportation achieves new efficiencies or other competitive advantages, some ports may suffer. *See* LANDSIDE ACCESS 43 (ports on the Gulf Coast and Great Lakes have suffered as freight has moved to markets in adjacent areas overland, rather than by ship). Others may benefit. The recent congestion at the Ports of Los Angeles and Long Beach, for example, has caused some shippers to reroute ships, sending goods through other ports. Jim Lynch, *Railroad Crisis a Boon for Port*, THE OREGONIAN, November 1, 1997, at B1 (major shipper moving business temporarily to Port of Portland); *Big Jams, supra* (major retailer sending cargo by water to the East Coast rather than through Los Angeles-Long Beach); *Anxious Shippers, supra* (traffic being diverted to other ports on East and West Coasts).

In a rapidly developing and changing worldwide market, exporters must be able to adapt rapidly to altered circumstances. If the exporter cannot get its product into the nearest port because of weakness in rail or road links, or out of that port

because of congestion that delays unloading the vessels that will carry its products overseas, it must be able to look elsewhere to find the capacity to move its products or face the risk of losing customers to those who can deliver more promptly. Just as the availability of many airports benefits all air travelers, the availability of many ports benefits even those exporters who may use only one of them today. Just as those businesses whose goods were primarily coming through the Ports of Los Angeles and Long Beach yesterday have benefitted from the availability of the other ports they are using today, so will other importers and exporters benefit from the availability of those other ports as their needs or external circumstances make it more expedient for their products to move through different channels and other ports.

A tax is, in general terms, an exaction that goes to the general support of the government. *Head Money Cases*, 112 U.S. at 595-96. It is consistent neither with this Court's cases nor with reality to suggest that a charge that is demonstrably used only for the purposes of maintaining harbors, *see United States Shoe Corp.*, 114 F.3d at 1579 (Mayer, J., dissenting), is transformed into a general revenue measure merely because a class of beneficiaries pays for a system of harbors that actually or potentially benefits all members of that class. The Constitution does not require Congress to blind itself to the realities of economic life, and this Court has repeatedly rebuffed requests that it do so. The court of appeals' overly narrow view of who benefits from the maintenance of a vibrant national freight transportation system and how they do so is out of step with the reality of modern intermodal freight transportation as well as inconsistent with this Court's practical fair apportionment jurisprudence.

CONCLUSION

This court should reverse the judgment of the Federal Circuit.

Respectfully submitted,

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No. 97-372

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In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES SHOE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR *AMICI CURIAE* BOISE CASCADE, ETONIC, INC., GERMAIN-WEBBER LUMBER CO., INTERNATIONAL VENEER CO., MONDIAL INTERNATIONAL CORP. and THE HEIL CO. URGING AFFIRMANCE OF THE JUDGMENT

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INTEREST OF *AMICI CURIAE*

The *amici curiae* are exporters that have paid the "Harbor Maintenance Tax" (hereinafter, HMT) pursuant to 26 U.S.C. §4461 and §4462, upon their exports.

STATEMENT

This brief is submitted on behalf of the *amici curiae* identified on the cover page.[1] This case concerns the propriety of the assessment of the HMT.

In *United States Shoe v. United States*, 114 F.3d 1564 (Fed. Cir. 1997), the court below rendered a decision finding the assessment of HMT on exports prohibited by the United States Constitution, Article 1, Section 9, Clause 5, which provides that: "No Tax or Duty shall be laid on articles exported from any State" (hereafter, the "export clause").

In *United States v. International Business Machines*, __ U.S. __, 116 S.Ct. 1793 (1996), this court held that the export clause prohibited a non-discriminatory tax on freight insurance policies covering goods exported from the United States. This recent affirmation of the limitations that the export clause places on the government is directly applicable to, and controlling of, the question of the constitutionality of the herein involved HMT.

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[1] *Amici curiae* appear with the consent of petitioner and respondent. Additionally, no counsel for any of the parties to this case authored this brief in whole or in part, and no person or entity or their counsel, outside of the *amici curiae*, made any monetary contribution to the preparation or submission of this brief.

Petitioner, in its brief, has couched the issue in this case in terms of whether the HMT is a tax or a "user fee." We do not agree that this is the issue in this case. The export clause is absolute in its terms in that the Government is prohibited from placing any burden upon exports, even if such burden could be labeled a "user fee." Moreover, even if we were to apply the tax/user fee test borrowed from cases dealing with other sections of the Constitution, it is nevertheless clear that the HMT is not a "user fee."

SUMMARY OF ARGUMENT

The assessment of HMT on exports violates the Export Clause because it burdens exports, and is levied during, or at the time of, exportation. The prohibition against taxes on exports also applies to "user fees" which raise federal revenue from exports. The HMT is not a user fee, and it is not saved by the commerce clause.

ARGUMENT

THE HMT ON EXPORTS IS UNCONSTITUTIONAL

A. Introduction

The question in this case is whether the HMT is a tax or duty on exported articles, in violation of Article 1, Section 9, Clause 5, of the United States Constitution. Supreme Court decisions construing the clause establish that a charge or fee is a prohibited tax or duty under the export clause if it is a burden on exports, and it is levied during, or at the time of, exportation. *See Barclay & Co. v. Edwards*, 267 U.S. 451, *petition for reh. den.*, 267 U.S. 442, (1924);

National Paper & Type Co. v. Bowers, 266 U.S. 373, (1924) (Income taxes on income gained from exports was not violative of the export clause even though foreign corporations were exempt from the tax); *A.G. Spalding & Bros. v. Edwards*, 262 U.S. 66, (1923) (Tax on the sale of all baseball bats and balls was held invalid with regard to exportations since the tax accrued at the time of sale, which in the case of the involved exports, occurred at the time of delivery of the goods to the carrier, or, during the time of exportation); *Thames & M. M. Ins. Co. v. United States*, 237 U.S. 19, (1915) (A tax on marine insurance policies covering exported goods violated the export clause); *United States v. Hvoslef*, 237 U.S. 1, (1915) (Stamp tax on "charter parties" for the exportation of goods to foreign ports was an invalid tax on exports); *Cornell v. Coyne*, 192 U.S. 418, (1904) (Tax on filled cheese did not violate the export clause since the tax accrued at the time of manufacture, and not at the time of exportation); *Fairbank v. United States*, 181 U.S. 283, (1901) (Stamp tax on bills of lading covering merchandise destined for foreign ports was in violation of the export clause); *Turpin v. Burgess*, 117 U.S. 504, (1886) (Charge for stamp to distinguish tobacco products destined for exportation and thereby excluded from a tax levied on domestic tobacco products, was not violative of the export clause); *Pace v. Burgess*, 92 U.S. 372, (1875) (Same statute in question as in *Turpin, supra*, but the tobacco stamp charge was upheld for different reasons).

This Court recently reaffirmed this rule in *International Business Machines ("IBM"), supra*, ("no burden by way of tax or duty can be cast upon the exportation of articles" if the tax is imposed "during the course of exportation"). The HMT is

such a burden and therefore is void with respect to exports. The petitioner's claim in this appeal that the HMT is a permissible "user fee" or is otherwise permitted under the commerce clause is erroneous. The export clause prohibits the government from regulating commerce through export taxes, or from collecting any revenue from exports, regardless of how denominated. Furthermore, the HMT is not a "user fee."

B. The HMT Is A Burden On Exports.

Central to the question of whether a given act of Congress imposing a fee or charge upon exports is in violation of the export clause, is the question of whether such fee or charge imposes a burden upon exports. In *Fairbank, supra,* the Court stated that [181 U.S. at 290]:

> The requirement of the Constitution is that exports should be free from any governmental burden....It is a restriction on the power of Congress....[which] should be enforced in accordance with its letter and spirit.

The Court continued [181 U.S. at 292-3]:

> [T]he purpose of the restriction is that exportation, all exportation, shall be free from national burden. This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose

> of revenue" but the motion was voted down. **So it is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports.**

See also United States v. Hvoslef, supra, 237 U.S. at 13; *IBM, supra,* 116 S. Ct. at 1797 ("The requirement of the Constitution is that exports should be free from *any* governmental burden," quoting *Fairbank*) (emphasis added).

The significance of the intent of the drafters of the Constitution to prohibit the placement of any governmental burden upon exports is not lost in the current era. It is common knowledge that the United States suffers a negative balance of payments with regard to international trade in goods and services. *See, e.g.,* Bureau of Economic Analysis, *Data From The Balance of Payments Accounts* (last modified Dec. 10, 1997) <http://www.bea.doc.gov/briefrm/curracct.htm; *U.S. International Trade In Goods and Services:* October 1997 <http://www. bea.doc.gov/bea/newsrel/trade1097.txt. Unquestionably the assessment of the HMT make U.S. exports more expensive and therefore less competitive in the international market place, which, if anything, exacerbates the balance of payment problem.

It is thus apparent that *any* burden on exports -- in the form of an expense that is imposed by the government and that is added to the cost of exporting merchandise -- is prohibited by the export clause,

whether one chooses to label such burden a tax, duty, or "user fee." If the tax causes the exporter to incur costs that make his or her products less competitive in the international market place, then the tax is prohibited under the Constitution.

C. Even Though The HMT Is Applicable To All Cargo And Passenger Service, It Is Invalid As To Exports Because It is Levied During Or At The Time Of Exportation.

The fact that the HMT is applicable to the movement of all cargo and passenger ship service does not render the tax valid as to exports. The fact remains that the HMT is assessed on exported goods during or at the time of exportation, and is invalid.

In *A.G. Spalding, supra*, the Court determined that the questioned tax was invalid as to the exportation of baseball bats and balls, even though the same tax was equally applied to domestically distributed merchandise. The point was that under the statutory scheme, the tax accrued at the time that the merchandise was sold, which in the case of exports, occurred at the time that the goods were delivered to the carrier. As such, the tax accrued *during* exportation, which rendered it invalid under the export clause. As stated by the Court [262 U.S. at 69]:

> The fact that the law under which the tax was imposed was a general law touching all sales of the class, and not aimed specially at exports, would not help the defendant [the Tax Collector] if

> in this case the tax was "laid on articles exported from any State", because that is forbidden in terms by the Constitution, Article I, § 9....

In *IBM, supra*, the Court reaffirmed this principle of *A.G. Spalding*, holding, "the Export Clause does not permit assessment of nondiscriminatory federal taxes on goods in export transit." 116 S. Ct. at 1804. Citing *A.G. Spalding*, the *IBM* Court made clear that a tax is invalid if "the taxable event ... occurred at the moment the goods entered the course of exportation." 116 S.Ct. at 1798.

Unquestionably, the HMT is a tax on the act of exportation, in which the taxable event occurs when (or after) the goods enter the course of exportation. In the case of exports, the HMT is imposed "at the time of loading" of the cargo on a vessel bound for exportation. 26 U.S.C. §4461(c)(2)(A). It is difficult to imagine a tax occurring any further in the course of exportation without the goods having exited the country. Moreover, it is of no moment that the same tax is also applicable to imports, passenger vessels and domestic cargo movements.

D. The Prohibition Of The Export Clause Also Applies To "User Fees".

In this appeal, petitioner claims that the HMT is not a tax at all but rather a "user fee," exacted by the federal government to cover some of the costs of maintaining the nation's harbors. While in some tax schemes an otherwise prohibited tax may be valid if it is earmarked to provide a certain benefit or service to the taxpayer, a tax in the guise of a user fee does

not survive the explicit prohibition of the export clause. The cases are clear that *all* burdens on exports are prohibited, whether they are for general revenue purposes or they are designed to provide funding for specific projects.

The prohibition of the assessment of any tax or fee on exports is absolute. As noted in the relevant portion from the above quoted materials in the *Fairbank* case [181 U.S. at 292-3]:

> This intent, although obvious from the language of the clause itself, is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose of revenue" but the motion was voted down.

Thus, it is of no moment that the tax upon exports is "for the purpose of revenue", or for some other purpose. It was the clear intent of the framers of the Constitution that *all* taxes and duties upon exports be prohibited. We have found no Supreme Court case in which an *ad valorem* assessment on exports, exacted at the time of exportation, was held to be a permissible user fee not barred by the export clause.

The case of *Pace v. Burgess, supra*, could be improperly cited for the proposition that user fee assessments do not violate the prohibition of the export clause. However, upon careful analysis of this case, it is evident that the fee in question therein was upheld on very different grounds. In fact, the fee aided in the export of the involved goods. In finding that the stamp fee at issue did not contravene the

export clause, the Court stated, in relevant part, that [92 U.S. at 375-6]:

> The stamp was intended for no other purpose than to separate and identify the tobacco which the manufacturer desired to export, and thereby instead of taxing it, to relieve it from the taxation to which other tobacco was subjected. It was a means devised to prevent fraud, and secure the faithful carrying out of the declared intent with regard to the tobacco so marked.
>
> * * * *
>
> A stamp may be used, and, in the case before us, we think it is used, for quite a different purpose from that of imposing a tax or duty: indeed, it is used for the very contrary purpose, -- that of securing exemption from the tax or duty.

Thus, the stamp fee was not a "user fee" regarding exports. Rather, it was a fee which exempted the exporter from the payment of a tax that would have otherwise accrued had the goods not been affixed with a stamp. Any doubt as to the true holding in *Pace* was settled by this Court in *IBM*, where it stated, "we upheld the charge [in *Pace*] on the basis that the stamps were designed to prevent fraud in the export exemption from the excise tax and did not, therefore, represent a tax on exports." 116 S. Ct. at 1796.

The HMT here in question does not involve the payment of a small fee for the privilege of exemption from a far greater tax. The HMT is a tax upon exported goods, pure and simple. Even if the HMT collected is destined for the special purpose of maintaining and improving certain harbor facilities, it is, nevertheless, a tax on exports, prohibited by the export clause.

E. The HMT Is Not a "User Fee".

Where user fees have withstood scrutiny by the Supreme Court, the constitutional provision in question was other than the export clause. Thus, while the characterization of the HMT as a user fee would not, as shown above, have any significance with regard to whether the HMT is violative of the export clause, the HMT is not in fact a user fee.

The basis of petitioner's user fee theory was summarized by the dissenting judge in the court below who stated that : "In sum, it surely does not violate Congress' intent to construe the HMT as a user fee" (Pet. App. 37a). The thrust of petitioner's argument is that the HMT is a "user fee" because the legislative history to the Act indicates that Congress intended it to be a "user fee," (notwithstanding the fact that the Act itself refers to the assessment as a "tax"). Yet intention cannot take the place of reality. The tax is imposed on an *ad valorem* basis which has no nexus to the harbor maintenance services provided. The tax is imposed upon exporters who are not the direct recipients of the services provided. Moreover, the ever growing surplus of funds in the Harbor Maintenance Trust Fund establishes that the exporters are being taxed far beyond the expenditures

required to maintain the harbors. In short, the realistic facts show that the HMT is not a user fee, notwithstanding the intendment of the drafters of the Act.

The government's case relies heavily on the fact that the HMT assessments are paid into a trust fund, and can be expended for maintenance of the nation's harbors. Petitioner argues that the HMT does not raise revenue for general welfare, and therefore is not a "tax" but is rather a user fee. The contention is illogical for several reasons. First, the proceeds of the HMT are revenue, albeit revenue collected for a specific purpose. In *IBM*, the Court bluntly decreed that the export clause "disallows *any* attempt to raise federal revenue from exports." 116 S. Ct. at 1802 (emphasis added).

Second, the HMT does not merely fund discreet services provided to the individual taxpayer, such as wharfage, pilotage or the like. Rather, the HMT revenue is earmarked for spending on federal projects that benefit the general welfare to a similar extent as other federal programs that are funded by Congress through specific allocations. The maintenance of navigable channels in our nation's harbors is essential to the ability of the nation to engage in international commerce. Maintaining the ports which make possible exportation can hardly be viewed as an exclusive service to shippers, but rather is an essential endeavor which undoubtedly benefits the general welfare. One must bear in mind that the manufacturers of goods sold for export, their employees, the banks financing export sales, the entire U.S. maritime industry, and others all depend upon properly maintained harbors. The HMT is truly

a tax, the revenue of which is expended for general welfare.

The Supreme Court warned of attempts to disguise an otherwise prohibited tax on exports as a user fee. As stated in *Pace v. Burgess, supra*, 92 U.S. at 376: "The point to guard against is, the imposition of a duty under the pretext of fixing a fee." In theory, it is possible to craft most any tax statute as a "user fee" by the simple expediency of earmarking the proceeds thereof for a specific purpose. That is the situation here with respect to the HMT.

CONCLUSION

For the foregoing reasons, the decision and judgment below should be affirmed.

Respectfully submitted,

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IN THE SUPREME COURT OF THE UNITED STATES OCTOBER TERM, 1997

UNITED STATES OF AMERICA,
Petitioner,

v.

UNITED STATES SHOE CORPORATION,
Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Federal Circuit

BRIEF OF AMICUS CURIAE Cobe Laboratories, Inc. Komatsu America International Corp. The NutraSweet Kelco Company Steelcase, Inc. Whirlpool Corporation In Support of Respondent United States Shoe Corporation

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34 pp

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QUESTION PRESENTED

Whether the United States Court of Appeals for the Federal Circuit correctly held that the Harbor Maintenance Tax, when imposed on merchandise exported from the United States, violates Article I, Section 9, Clause 5 of the United States Constitution (hereinafter the "Export Clause"), which provides that "[n]o Tax or Duty shall be laid on Articles exported from any State."

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INTEREST OF AMICI CURIAE

Cobe Laboratories, Inc., Komatsu America International Corp., The NutraSweet Kelco Company (a unit of Monsanto Company), Steelcase Inc. and Whirlpool Corporation (hereinafter "Amici") export office furniture, medical equipment, high intensity sweeteners, excavation and mining equipment, washing machines, refrigerators and ovens. In the ten year period between 1987 and 1997, Amici have, as a group, paid in excess of $2.7 million in Harbor Maintenance Tax (hereinafter "HMT") on exports, pursuant to 26 U.S.C. § 4461 (1994). Also, each of the Amici has filed individual cases in the United States Court of International Trade to challenge the constitutionality of the HMT. As the instant case was selected by that court as a test case on the question of the constitutionality of the HMT, and because Amici's cases were stayed by that court pending final disposition of the case at bar, Amici have a direct and substantial interest in the outcome of this case.

The government has asserted that the HMT does not violate the Export Clause and provides a benefit to all exporters. However, the facts surrounding Amici's own export activities alone demonstrate otherwise. Consequently,

Amici wish to provide the Court with this information and respectfully submit this brief to the Court.

On January 9, 1998, Amici made requests to all parties before the Court for oral argument for leave to file this *amicus curiae* brief. United States Shoe Corporation, through counsel Brian S. Goldstein, consented by letter dated January 12, 1998. The United States, through its Solicitor General, the Honorable Seth P. Waxman, also consented by letter dated January 12, 1998.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case in the Brief filed by Respondent, United States Shoe Corporation.

SUMMARY OF ARGUMENT

This Court's clear and longstanding Export Clause jurisprudence demonstrates that the HMT is an unconstitutional tax on exports. The strict language of the Export Clause prohibits any and all taxes upon exports, and only the most narrowly drawn user fee for governmental

services related to exports could possibly be permitted under this clause. An analysis of the HMT demonstrates that it cannot meet the stringent requirements for any such exception. As the United States Court of Appeals for the Federal Circuit (hereinafter "CAFC") and the United States Court of International Trade (hereinafter "CIT") correctly found, the HMT is intended neither to regulate commerce nor to repay the cost of services provided to exporters. This conclusion is strengthened by the fact that exporters, such as Amici, who pay HMT at particular ports often receive little or no benefit from these HMT payments at those ports. In addition, while it has been suggested that exporters nonetheless benefit because HMT funds are used to develop and maintain the nation's transportation infrastructure, this purported benefit is largely illusory. Exporters are typically limited by geographic and economic constraints to using a small number of ports. Because exporters do not have the luxury of choosing or using other ports, they receive no benefit from the HMT they pay if these funds are not somehow allocated, at least in part, for the maintenance of ports they use.

This Court has applied a three-prong test for distinguishing between user fees and taxes in cases that did not concern the Export Clause. This Court's Export Clause

jurisprudence is clear and controlling, and non-Export Clause cases are not relevant to determining the constitutionality of the HMT. However, even assuming *arguendo* that these other cases do apply, it is clear that under the three-prong test the HMT is a tax. First, the HMT is not based on a fair approximation of use, since it is an *ad valorem* tax. There is no relationship whatsoever between the amount of HMT collected at a particular port and exporters' use of that port. Second, the HMT is not fairly apportioned to the cost of the supposed benefits conferred. The enormous surplus of HMT revenues over expenditures highlights the complete lack of correlation between HMT revenues and the cost of any services provided. Third, the HMT is discriminatory, since it exempts many activities and commodities from payment of HMT.

ARGUMENT

I. The HMT is an Unconstitutional Tax on Exports, in Violation of the Export Clause of the United States Constitution.

The Court has traditionally interpreted the Export Clause of the United States Constitution to prevent any and all taxes

on exports. *See, e.g., Fairbank v. United States*, 181 U.S. 283 (1901); *United States v. Hvoslef*, 237 U.S. 1 (1915); *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915). The Court recently reaffirmed the broad, expansive and protective nature of the Export Clause in *United States v. International Business Machines Corp.*, 116 S. Ct. 1793 (1996). In that case, after examining the historical underpinnings of the Export Clause, the Court categorically rejected the government's assertion that the "narrow historical purpose" behind the clause required a restrictive interpretation of the clause's language:

> While the original impetus [behind the Export Clause] may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language.

Id. at 1803.

In following these precedents, the CAFC correctly affirmed the CIT's holding that the HMT is an unconstitutional tax on exports, in violation of the Export Clause. *United States Shoe Corp. v. United States*, 114 F.3d

1564 (Fed. Cir. 1996), *aff'g* 907 F. Supp. 408 (Ct. Int'l Trade 1995). The CAFC reasoned that for the HMT to pass constitutional muster, the tax must either be primarily intended to regulate commerce (not to raise revenue) or be intended to recoup the cost of services rendered to exporters under a regulatory scheme. On analyzing the precise nature and effect of the tax, the CAFC correctly held that the HMT utterly failed to satisfy either one of these criteria. *Id.* at 1575-77.

A. The HMT is Intended to Raise Revenue in Violation of the Export Clause.

One of the permissible objectives that might be allowed under the Export Clause, according to the CAFC, is if the HMT served the purpose of regulating commerce, as opposed to raising revenue. However, as the CAFC correctly noted, "[t]he government has failed to point to any indication that the HMT is intended to regulate commerce. Indeed, it appears that the HMT regulates nothing." *Id.* at 1576. While less blunt, the CIT decision also provided a telling analysis of why the HMT does not regulate commerce: the HMT "does not seek to control the amount or manner of port use ... does not seek to influence commercial practices, or

seek to enforce compliance with a legislative goal ...." *United States Shoe Corp. v. United States*, 907 F. Supp. 408, 413-14 (Ct. Int'l Trade 1995) (citing S. Rep. No. 99-126, at 7 (1985), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644), *aff'd*, 114 F.3d 1564 (Fed Cir. 1996). Instead, the court concluded, Congress "sought funding for the extensive maintenance projects envisioned under the Act [establishing the HMT]." *Id.*

In support of their finding that the HMT was not intended to regulate commerce, both the CIT and CAFC also contrasted the HMT's statutory authorization, the Water Resources Development Act of 1986, Pub. L. No. 99-662, § 1402, 100 Stat. 4082, 4266 (1986) (codified as amended in scattered sections of U.S.C. Titles 26 and 33), with the export regulatory program analyzed by the United States Court of Appeals for the Ninth Circuit in *Moon v. Freeman*, 379 F.2d 382 (9th Cir. 1967). In that case, the Ninth Circuit concluded that an export certificate program, which in effect imposed a monetary penalty for overproduction of wheat, was intended primarily to regulate foreign and domestic commerce in wheat, not to raise revenues. *See id.* at 384. The court explained that the key question is whether the *primary* purpose of the program is to regulate commerce or to raise revenue:

> The test to be applied is to view the objects and purposes of the statute *as a whole* and if from such examination it is concluded that revenue is the primary purpose and regulation is merely incidental, the imposition is a tax and is controlled by the taxing provisions of the Constitution. Conversely, if regulation is the primary purpose of the statute, the mere fact that incidentally revenue is also obtained does not make the imposition a tax, but a sanction imposed for the purpose of making effective the congressional enactment.

Id. at 391 (emphasis added) (quoting *Rodgers v. United States*, 138 F.2d 992, 994 (6th Cir. 1943).

1. The most cursory examination of the revenues generated by the HMT demonstrates that the HMT is primarily intended to raise revenue. Even at the time of its passage, Congress realized that the HMT would raise far more funds than were needed to maintain the nation's harbors and waterways, and that these excess funds could be used to offset the federal deficit. The House Committee on Ways and Means, for example, observed that "[t]he increase in net budget receipts of $731 million over the 5-year fiscal period, 1986-1990, will reduce the potential Federal budget deficit

by a like amount." H.R. Rep. No. 99-251(III), at 19 (1985). The Senate Environment and Public Works Committee noted that the HMT would raise an estimated $140 million annually. S. Rep. No. 99-126, at 9 (1985), *reprinted in 1986* U.S.C.C.A.N. 6639, 6646. True to these hopes, the HMT has generated enormous surpluses since its inception. In 1993, the Harbor Maintenance Trust Fund (hereinafter "HMT Trust Fund") contained a surplus of over $450 million. As of fiscal year 1996 the total surplus had reached $865 million, and is expected to grow to nearly $3 billion by fiscal year 2001. *See Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1993* at 5 (1994) (hereinafter "*Second Annual Report*"), *cited in U.S. Shoe*, 907 F. Supp. at 412; *see also Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Years 1995 and 1996* at 7 (1997) (hereinafter "*Fourth Annual Report*").

Moreover, Congress itself has undercut the government's feeble assertion that the HMT is not intended to raise revenue (Pet'r Br. at 16-18), by acknowledging in these very statements that the HMT surplus is being used to offset the federal deficit. In essence, the surplus generated by HMT collections in excess of expenditures is being used to reduce the amount of the federal government's debts, thereby

creating a more favorable financial picture and allowing the government to more easily borrow money for other projects.

2. The HMT not only raises revenue, but also is harmful to the U.S. economy. The federal government has a general policy of promoting U.S. exports. Unlike the export certificate program in *Moon*, 379 F.2d at 382, through which regulation was achieved by penalizing overproduction, U.S. exports are encouraged by Congress through various export assistance programs and entities. *See, e.g.*, 12 U.S.C. § 635 (1994) (establishing the Export-Import Bank of the United States "to aid in financing and to facilitate exports of goods and services"); 22 U.S.C. § 2191 (1994) (creating the Overseas Private Investment Corporation in order to promote investments in and exports to developing countries); 15 U.S.C. § 649 (1994) (establishing the Office of International Trade for the purpose of "working in close cooperation with the Department of Commerce and other relevant Federal Agencies ... engaged in export promotion efforts"); 15 U.S.C. § 4721 (1994) (establishing the International Trade Administration's United States and Foreign Commercial Service, which is directed to "place primary emphasis on the promotion of exports of goods and services from the United States"). The HMT acts in direct opposition to these other programs by taxing, and therefore raising, the cost of

exports, often significantly. For example, the cost of HMT on a single earth moving machine or mining truck exported by Komatsu America International Corp. may be over $1,000 *per vehicle*. Increased costs mean reduced or eliminated profit margins, and thus fewer U.S. jobs,[1] as well as a worsened U.S. balance of payments. By discouraging exports through taxation, the HMT ironically works against the very programs Congress has created to promote exports.

B. The HMT is Not Intended to Repay the Cost of Services Provided to Exporters.

Moreover, both the CAFC and CIT correctly concluded that the HMT is not designed to repay the cost of services provided to exporters. As the CAFC found, the HMT is intended to "rais[e] money to maintain the harbors *in a manner that is not reasonably connected to the exporter's use of the harbors*, and is therefore unconstitutional." *U.S. Shoe*, 114 F.3d at 1576 (emphasis added). The CIT held that "little nexus binds the imposition of the *ad valorem* tax on cargo to the costs of port maintenance and regulation of

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[1] Amici alone employ a total of approximately 45,000 people in United States.

shipping," and observed that the HMT has "no mechanism to ensure that the fees collected will be used 'only or primarily for the cost of' port maintenance associated with the shipping that is taxed." *U.S. Shoe*, 907 F. Supp. at 414-15. As discussed below, a comparison of Amici's HMT payments on exports with the government's own studies of HMT expenditures fully supports the courts' findings. In the absence of the slightest correlation between HMT payments and expenditures, the government's contention that the HMT is a legitimate user fee intended to cover the cost of services provided to exporters amounts to no more than pure fantasy and wishful thinking.

1. The government's argument suggests that there does not need to be any correlation between HMT payments made at a particular port and HMT expenditures made at that port. (Pet'r Br. at 29). The government's national, port welfare-based argument may be summarized as a syllogism:

(1) Maintenance of the nation's infrastructure benefits all exporters.

(2) The HMT is intended to help maintain the nation's infrastructure.

(3) The HMT therefore benefits all exporters.

The State of Oregon, as amicus, also advances this argument. (Oregon Amicus Br. at 6-10). However, it should be noted that Oregon has a vested interest in doing so, because as the government's own study shows, Oregon ports have received virtually a 100 percent return between HMT fees collected on exports and port expenditures by the Federal Government, a rare event in HMT history. *See* Army Corps of Engineers, *Estimated Receipts of Harbor Maintenance Fee from Cargo Transiting Major Ports* (1992) (draft) (hereinafter "*Army Corps of Engineers Report*").

However, this port welfare argument is fatally flawed, because it rests on the faulty assumption that all exporters invariably benefit from harbor maintenance expenditures at ports they do not use. This is simply not the case. First, four of the Amici are located in Illinois and Michigan, which are serviced by the Great Lakes ports. In addition to these ports not having the necessary port infrastructure to accept Amici's shipments, they possess several geographic and atmospheric limitations: (1) the Great Lakes connect to the Saint Lawrence Seaway, which is the route eastward toward Europe; and (2) due to snow, ice and other extreme weather

conditions, the route is not available for several months of each year.[2]

Second, for shipments to Latin American and Asian markets, all five Amici must rely on southern and west coast ports, particularly Cobe Laboratories, Inc., which is located in Colorado and is completely landlocked. In other words, for all five Amici, geographically local ports are unavailable or do not exist. To suggest that Illinois, Colorado and Michigan exporters derive benefits from local ports they cannot use, or which do not exist, is ludicrous. On the contrary, high transportation costs restrict these exporters to a small number of ports located in distinct geographic regions, such as the west coast and Florida. To them, it is irrelevant whether all other U.S. ports are well-maintained or not; Amici can only benefit from harbor maintenance expenditures at the ports they can use.

For example, Amici sell high value goods such as excavation equipment, mining equipment and medical equipment to Latin American and Pacific rim markets. Other

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[2] Ironically, an alternative route during that time is overland via rail to Montreal, thus avoiding payment of HMT. *See* 19 C.F.R. § 24.24(b).

high volume products, such as sweeteners, also translate into high value exports on a cumulative level. Amici typically export these products to those markets by sea from ports located in the states of Florida and California. Again, the simple reason is geography. It is not commercially viable for them to ship these products from ports located in other regions of the country, since this would greatly increase overland transportation costs. Splitting their exporting activities among a larger number of ports is also economically undesirable, because this would eliminate any volume-based discounts which these exporters may obtain for overland or sea transport of these goods.[3]

Due to the fact that they must use a small number of ports in distant areas of the country, exporters such as Amici can receive no benefit from their HMT payments unless those funds are expended, at least in part, to maintain the ports used by them. Yet even the government has conceded that "[t]here is no relationship between the amount of money

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[3] The State of Oregon acknowledges that economies of scale and containerization have led exporters to concentrate their export activities at a smaller number of terminals. (Oregon Amicus Br. at 8) (citing Transportation Research Board, National Research Council, *Landside Access to U.S. Ports* at 42 (1993)).

spent on a port's maintenance and the amount of revenue collected from cargo moving in or out of that particular port." *Corps of Engineers Briefing Book and Fact Sheets on the HMT and Fund* at 1 (Feb. 14, 1990). Without such a relationship, the HMT clearly does not repay the cost of services allegedly provided to Amici as exporters, and is therefore a tax.

2. HMT revenue and expenditure data for certain west coast and southern ports demonstrate the accuracy of this conclusion. For example, in 1992, exporters using the ports of Los Angeles and Long Beach, California paid approximately $141,746,000 in HMT on exports from those ports, yet the ports in question only received roughly $162,000 in HMT expenditures. In other words, receipts exceeded expenditures at those ports by 875 to 1. Similarly, exports in that same year from Tacoma, Washington generated an estimated $28,687,500 in HMT revenues, yet this port only received $135,500 from the HMT Trust Fund for port maintenance (a ratio of 212:1). Revenues and expenditures in 1992 for various west coast and southern ports show this disparity:

Port	HMT Revenues	HMT Expenditures	Ratio
Los Angeles/ Long Beach	$141,746,000	$162,000	875:1
Jacksonville/ Port Everglades	$17,442,500	$290,800	60:1
Miami	$17,360,000	$683,000	25:1
Tacoma	$28,687,500	$135,500	212:1

See Army Corps of Engineers Report. While these figures are approximate only, they do convey the severe disparity between the HMT which exporters who use these ports (such as Amici) are required to pay and the so-called "benefits" they receive at those ports from these payments.

This imbalance is strikingly illustrated by the fact that during 1992 alone, Amici paid a total of over $330,000 in HMT on exports--a figure that exceeds the estimated HMT expenditures at the ports of Los Angeles, Long Beach, and Tacoma *combined*. As the government has noted, there are over four thousand HMT cases pending below, yet these five companies alone contributed amounts equal to half the cost of expenditures at a major port for Latin American exports

such as Miami, and paid twice the amount expended at Los Angeles/Long Beach, a major port for Pacific rim markets. (Pet'r Br. at 4); *See also Army Corps of Engineers Report*.

As noted above, these HMT figures also suggest a motive for Oregon's statements in favor of the HMT. In 1992, approximately $18,650,000 in HMT expenditures were made at the port of Portland, Oregon. In that same year, exporters using that port paid just over $19,000,000 in HMT. *See Army Corps of Engineers Report*. Unlike other major west coast ports, such as Los Angeles and Long Beach, Portland received nearly as much in HMT expenditures as it generated in HMT revenues on exports. Even its sister port in the neighboring state of Washington (Tacoma), which in 1992 generated 50 percent more HMT revenue from exports than Portland, was nowhere near as fortunate as Portland and received a paltry $135,000 in HMT expenditures. *See id.* Given such significant and large-scale investment in its port facilities, it is certainly understandable that Oregon would be reluctant to lose this lucrative source of funds.

Amici's choice of ports is limited due to the bulky nature of their goods and by the cost of U.S. inland transportation for such goods. As such, exporters such as Amici can only benefit from HMT expenditures made at

ports which they actually use. Yet the HMT payments of the five Amici alone demonstrate there is no rational relationship between HMT revenues collected from ports they actually use and HMT expenditures made at those ports. The inevitable conclusion is that, as found by the courts below, there is little or no nexus between the HMT payments made by exporters and the benefits they receive, and that the HMT is not intended to repay the cost of services provided to exporters.

3. Amici's objections to the HMT should not be misconstrued as opposition to a well-designed program to maintain and develop this nation's waterways and port facilities. Harbor maintenance and upkeep is undeniably important. However, funding such programs via a tax on exports is not the proper means for achieving this end. As the Court has noted, when there is a conflict between a congressional statute and the Constitution, the Constitution must prevail. *See Adkins v. Children's Hosp. of the Dist. of Columbia*, 261 U.S. 525, 544 (1923). In any case, affirmance of the lower courts' decisions regarding the HMT will not eliminate the government's ability to maintain the nation's ports and waterways, as the constitutionality of HMT as applied to other than exports is not in question. As exports account for only 27 percent of HMT collected, the

remaining HMT funds still will be available for port maintenance. *See Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1994* at 3 (1995).[4]

II. The Cases Relied Upon by the Government in Contending that the HMT is a Permissible User Fee are not Relevant in the Export Clause Context.

As discussed above, this Court's Export Clause jurisprudence, including *IBM*, 116 S. Ct. 1793, demonstrates unequivocally that the Export Clause's prohibition on taxation of exports must be construed broadly, and that the HMT is an impermissible tax upon exports. Despite these clear pronouncements, the government fails even to cite the *IBM* decision in its brief with this Court. Instead, the government turns to non-Export Clause jurisprudence in a poor attempt to portray the HMT as a permissible user fee. However, the cases on which the government bases its

[4] This 27 percent figure is based on the total of exports as a percentage of net HMT collections shown in the table on page 3 of the report.

argument are simply not relevant to determining whether the HMT violates the Export Clause.

In its effort to present the HMT as a permissible user fee, rather than an impermissible tax, the government relies primarily on *Massachusetts v. United States*, 435 U.S. 444 (1978), and *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972). These cases employed the following test to distinguish between user fees and taxes:

> (1) Whether the charge is based on a fair approximation of use.
>
> (2) Whether the charge is fairly apportioned to the cost of benefits provided.
>
> (3) whether the charge is nondiscriminatory.

Under this analysis, if all three criteria are answered affirmatively, a charge is a permissible user fee; otherwise, the charge is a tax. *Massachusetts*, 435 U.S. at 466-67 (citing *Evansville-Vanderburgh*, 405 U.S. at 707).

These decisions are not relevant to the instant case, because they do not concern the Export Clause. Rather, the *Massachusetts* decision addressed the question of whether an aircraft registration fee violated the intergovernmental tax immunity doctrine; the *Evansville-Vanderburgh* case dealt with the validity of an airport user fee under the Commerce Clause. However, it is this Court's clear Export Clause precedents, not a user fee test analogized from other areas of law, which are controlling. *See, e.g., IBM*, 116 S. Ct. 1793.

1. Yet even assuming *arguendo* that the analysis set forth in *Massachusetts* and *Evansville-Vanderburgh* is relevant, it is clear that under this three-prong test the HMT is an unconstitutional tax on exports, not a permissible user fee. First, the HMT is not based on a fair approximation of use. As the CIT correctly noted, exporters of high value goods pay proportionately more HMT, even though they impose less of a burden on port resources, channels, and harbors than exporters of low value bulk goods, which pay proportionately less HMT. *See U.S. Shoe*, 907 F. Supp. at 415. Regardless of a cargo's weight, volume, or difficulty of loading, HMT is always assessed solely on the basis of the cargo's value. *See* 26 U.S.C. § 4461 (1994). In comparison, the charges at issue in the *Massachusetts* and

Evansville-Vanderburgh cases were flat fees. Also, as discussed above, there is absolutely no relationship between the HMT funds collected at a particular port and the expenditures from the HMT Trust Fund used to maintain and improve that port. *See U.S. Shoe*, 907 F. Supp. at 415; *Army Corps of Engineers Report*.

Moreover, as demonstrated above, the government's contention that all exporters benefit from nationwide HMT expenditures, regardless of whether these expenditures are made at ports used by these exporters, is simply false. The government's citation of the *Massachusetts* decision in support of this claim is equally unpersuasive. That case involved a user fee assessed against aircraft for airport services. As the Court found in that case, aircraft, by their very nature, do benefit from a fee that contributes to nationwide airport services, since any given aircraft could land at numerous airports nationwide and receive airport services there. *See Massachusetts*, 435 U.S. at 468. This reasoning simply cannot be applied to exporters of high value goods, who do not benefit from HMT expenditures at ports

they cannot use.[5] The government's argument flies in the face of commercial realities and must be rejected.

2. Second, the HMT is not fairly apportioned to the cost of benefits conferred. Since its inception, HMT revenues have far outpaced the cost of harbor maintenance. As noted above, the total surplus exceeded $860 million by fiscal year 1996, and is projected to reach nearly $3 billion by fiscal year 2001. *See Fourth Annual Report* at 7; *see also Second Annual Report* at 5. In fact, the HMT Trust Fund's surplus for the first eight months of fiscal year 1996 ($167 million) was nearly equal to the amount of HMT collected on exports alone for that same period ($166 million). *See Dept. of the Treasury Harbor Maintenance Trust Fund Income Statements 10/01/95-05/31/96*. While a user fee need only be a "fair approximation of the cost of benefits supplied" and not a precise calculation, since such precision would be unduly burdensome, *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989) (quoting *Massachusetts*, 435 U.S. at 463 n.19), the HMT Trust Fund's gross disparity between receipts and

[5] Contrary to the government's assertions to Congress in the Annual Reports on the status of the HMT Trust Fund, the exports of Amici show that exports are *not* generally low value bulk goods. *See, e.g., Second Annual Report* at 2.

expenditures is in no way, shape, or form a "fair approximation."

In addition, the HMT is not fairly apportioned to the cost of benefits supplied (if any) because there is no relationship between HMT receipts at a given port and expenditures at that port. This lack of correlation between HMT paid and expenditures received at various ports is clearly illustrated by the Army Corps of Engineers' figures, which list HMT revenues and expenditures for various ports.[6] *See Army Corps of Engineers Report*. As the Court of International Trade noted in its opinion, this report demonstrates that large ports pay the majority of the HMT, but receive no more than thirty percent of these payments back in the form of maintenance expenditures at those ports. *U.S. Shoe*, 907 F. Supp. at 415 (citing *Army Corps of Engineers Report*).

3. Third, the HMT is discriminatory, since it provides numerous exemptions from payment of the HMT. For example, ferries, ship's stores, noncommercial vessels, and shipments to and from Alaska, Hawaii, Puerto Rico, and U.S. possessions are exempted from HMT payments. Deep

[6] Some of these figures are cited above in section I.A.

draft vessels that enter a port for repairs and cargo vessels that unload and depart empty are also excluded, even though these vessels indisputably do use port resources and contribute to port deterioration. These exceptions unquestionably discriminate in favor of certain ports and port activities, and against ordinary exporters, who in effect are helping to subsidize port use by exempted parties--including U.S. government ships that are allowed to use deep water ports without paying the HMT--so that the cost of maintaining harbors they use is inevitably subsidized by exporters such as Amici. *See* 26 U.S.C. § 4462 (providing various exemptions from HMT payments).

Under the *Massachusetts/Evansville-Vanderburgh* analysis, a charge that fails to meet any one of these three criteria is an unconstitutional tax, not a permissible user fee. In this case, the HMT on exports fails on all three counts, and accordingly is without question an unconstitutional tax on exports.

CONCLUSION

For the above reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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January 14, 1998

Supreme Court, U.S.
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No. 97-372

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

THE UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES SHOE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* BAXTER HEALTHCARE CORPORATION, CLARK OIL TRADING COMPANY, IBP, INC., MOTOROLA, INC., PERSECO ASIA-PACIFIC LLC, AND STONE CONTAINER CORPORATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

If the Court rules that the Harbor Maintenance Tax is unconstitutional, whether an exporter who has paid the Tax and commenced an action for a refund is entitled to a refund of all taxes paid by the exporter?

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INTEREST OF *AMICI CURIAE* AND CONSENT OF PARTIES

Baxter Healthcare Corporation, Clark Oil Trading Company, IBP, Inc., Motorola, Inc., Perseco Asia-Pacific LLC, and Stone Container Corporation, *amici curiae* in this appeal, respectfully submit this brief in support of United States Shoe Corporation ("U.S. Shoe"). Both the petitioner and respondent have consented in writing to the filing of this brief.

Baxter Healthcare Corporation of Deerfield, Illinois, is the world's largest producer and marketer of health care products, systems, and services. It manufactures products in 20 different countries and distributes them in over 100.

Clark Oil Trading Company of St. Louis, Missouri, is a Missouri general partnership. It trades, transports and stores petroleum and petroleum products in various markets.

IBP, Inc. of Dakota City, Nebraska, is the largest U.S. exporter of red meat and related products. It has offices in England, Japan, Taiwan, China, Korea, and Mexico.

Motorola, Inc. of Schaumburg, Illinois, is the world's leading manufacturer of cellular subscriber and infrastructure products, as well as radio, computer, automotive, and semiconductor products.

Perseco Asia-Pacific LLC is a Delaware limited liability company. It provides purchasing services for packaging products for the McDonald's restaurants system.

Finally, Stone Container Corporation of Chicago, Illinois, is the nation's largest manufacturer of kraft linerboard, corrugated medium, and corrugated products. It

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Pursuant to Rule 37.6, *amici* state that no counsel for either party to this case has authored this brief in whole or in part. In addition, no person or entity other than the *amici* and their counsel has made a monetary contribution to the preparation and submission of this brief.

is one of the world's largest producers of pulp, paper, and packaging products.

As significant U.S. exporters who have paid collectively Harbor Maintenance Taxes ("HMT") in excess of $15 million, *amici curiae* have an interest in the outcome of this appeal. *Amici curiae* agree with Respondent that the HMT violates the Export Clause of the Constitution (U.S. Const. art. I, § 9, cl. 5), but urge this Court also to rule that the statute of limitations contained in 28 U.S.C. § 2636(i)[1] should not act as a bar to recovery of refunds from the date of enactment of the HMT.

STATEMENT OF THE CASE

Amici curiae adopt the Statement of the Case contained in Respondent's Opposition to the Petition for Certiorari. *Amici curiae* note that the case currently before the Court is a test case. Over 5000 other cases are pending in the United States Court of International Trade ("CIT"), as well as several hundred cases in the U.S. Court of Federal Claims ("CFC"), all of which seek recovery of HMT deposits. Some of the cases filed, like

---

[1] Under the decisions of the lower courts, the U.S. Court of International Trade has jurisdiction over a refund action pursuant to 28 U.S.C. § 1581(i). The government has not appealed that aspect of the lower courts' decisions to this Court, although it has hinted it may relitigate this issue in other cases. Petition for Writ of Certiorari at 7, n. 2; Petitioner's Brief at 7-8, n. 3.

Section 1581(i) is the "residual" jurisdiction provision of the Court of International Trade and covers a wide variety of actions. Pursuant to 28 U.S.C. § 2636(i), an action brought pursuant to Section 1581(i) must be brought within two years from the date the action accrued.

United States Shoe, seek only recovery of HMT that was due and paid within the two years of the commencement of the refund action.[2] Many of the cases, however, request refunds for HMT paid more than two years prior to the commencement of the actions.

After resolution of this appeal, the government is likely to raise the statute of limitations contained in 28 U.S.C. § 2636(i) as a defense in those actions where a plaintiff seeks recovery of HMT paid more than two years prior to the commencement of the action. Indeed, the statute of limitations issue has already been raised in *United States Shoe*, inasmuch as the three-judge panel of the CIT disagreed on whether the statute of limitations precludes plaintiffs from recovering all of the HMT they have paid. 907 F. Supp. at 421, n.2. In addition, the government has already addressed this issue in its brief at the Federal Circuit by stating that the concurring opinion of Judge Musgrave lacks support. Government Brief at 13-14, n.7. While resolution of this issue will not impact U.S. Shoe's recovery of HMT in this action, *amici curiae* believe the Court should address the issue now because of its importance to the litigation. It is virtually certain that the issue will be raised in another case if not answered here. By addressing the issue in this case, the Court will ensure the speedy administration of justice and not waste judicial resources.

---

[2] If the Court disagrees with the position of *amici curiae* in this brief, cases filed in the CFC would be subject to a six year statute of limitations. 28 U.S.C. § 2501(a). However, given the CIT's holding that it has jurisdiction over a refund action pursuant to 28 U.S.C. § 1581(i), and that Section 1581(i) grants the CIT *exclusive* jurisdiction, the government will likely argue the CFC lacks jurisdiction over these HMT refund actions.

SUMMARY OF ARGUMENT

An unconstitutional law is void *ab initio*; it has no effect. Although 28 U.S.C. § 2636(i) states that actions commenced in the Court of International Trade pursuant to 28 U.S.C. § 1581(i) must be commenced within two years from the date the action accrues, application of this statute to an HMT refund action constitutes a violation of due process. The remedy for correcting the collection of an unconstitutional tax must be one which provides complete and meaningful backward looking relief. Allowing the government to keep any of the HMT it collected in violation of the Constitution, when Congress knew it was enacting an unconstitutional law, would not constitute complete and meaningful relief. Instead, it would reward the government's knowing violation of the Export Clause of the Constitution. Alternatively, HMT paid by an exporter may be refunded through equitable recoupment.

ARGUMENT

I.

THE STATUTE OF LIMITATIONS SHOULD NOT APPLY TO AN HMT REFUND ACTION.

A. The HMT Assessed on Exports Is Void *Ab Initio*.

Amici curiae adopt the arguments set forth in Respondent's brief, as well as those set forth in the decisions below, that the HMT violates the Export Clause of the Constitution. If this Court agrees that the HMT is unconstitutional, it also should rule that the HMT is void *ab initio*.

In *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803), Chief Justice Marshall struck down an act of Congress authorizing the Supreme Court to issue writs of mandamus to federal officials as unconstitutional. In striking down the law, he observed that "a law repugnant to the Constitution is void." 5 U.S. at 177.

While *Marbury* did not involve the Export Clause, the Court applied this principle in the context of the Export Clause nearly 100 years later. In *Fairbank v. United States*, 181 U.S. 238 (1901), the Court held that a tax on bills of lading covering exports was tantamount to a tax on the exports themselves. Accordingly, the Court ruled that the tax violated the Export Clause. Quoting *Marbury*, the Court again observed that a law "repugnant to the Constitution is void." 181 U.S. at 284.

Similarly, in this case the HMT violates the Export Clause. Accordingly, it is void and must be treated as if it were never enacted.

B. The Appropriate Remedy to Correct a Law That Is Void *Ab Initio* Is to Refund All Money Improperly Collected Under the Law.

The Due Process Clause of the Fifth Amendment states that no person may be deprived of property without due process of law. U.S. Const. amend. V. Allowing the government to retain those taxes collected without any authority would deprive exporters of their property without due process. "[A] long line of cases has established that due process requires a 'clear and certain' remedy for taxes collected in violation of federal law." *Reich v. Collins*, 513 U.S. 106, 108 (1994) (citations omitted).

In *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990), for example, the Court reversed a decision of the Florida Supreme Court that refused to grant a refund to taxpayers that paid an unconstitutional excise tax. 496 U.S. at 26. In reversing the Florida Supreme Court, the Court ruled that if a state penalizes taxpayers for failure to remit their taxes in a timely fashion, thus requiring them to pay first and obtain review later, the Due Process Clause of the Fifth Amendment requires the state to afford a *meaningful backward* looking remedy for taxes paid pursuant to an unconstitutional tax scheme. *Id.* at 31. In so ruling, the Court noted that this principle was "firmly rooted in precedent dating back to at least early this century." *Id.* at 32.

Thus, in *Atchison, T. & S.F.R. Co. v. Connor*, 223 U.S. 280 (1912), the Court also instructed:

> It is reasonable that a man who denies the legality of a tax should have a *clear and certain* remedy. The rule being established that apart from special circumstances he cannot interfere by injunction with the State's collection of its revenues, an action at law to recover back what he has paid is the alternative left.

223 U.S. at 285 (emphasis added). Similarly, in *Ward v. Love County Board of Commissioners*, 253 U.S. 17 (1920), the Court ordered a county to refund unconstitutional taxes it had collected:

> To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the

> property of these Indian allottees arbitrarily and without due process of law.

253 U.S. at 24.

In sum, the rule applicable to unconstitutional taxes such as the HMT is: "If a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy." *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 760 (1995) (Scalia, J. concurring). Accordingly, this Court should direct the CIT to order the Customs Service to refund all HMT collected by the government for each exporter who has filed suit, plus interest on such deposits.

C. Congress's Knowledge That the HMT Was Unconstitutional Favors Granting Exporters a Complete Refund of All HMT Paid.

While this Court has stated that an unconstitutional claim can become time-barred, *Board of Regents v. Tomanio*, 446 U.S. 478 (1980), the facts surrounding the enactment of the HMT justify refunding all HMT paid by an exporter. The Court has recognized in the past that the nature of a remedy available in a case depends upon the type of case, and the matter and circumstances involved. *Reynoldsville*, 115 U.S. at 1749.

In this case, Congress knew it was enacting an unconstitutional tax. Evidence of Congress's knowledge is readily obtained from the legislative history of the HMT:

> Based upon its analysis, the Committee determined that section 1301 of H.R. 6, as reported by

> the Committee on Public Works and Transportation, which levies a uniform *ad valorem* tax, *may raise constitutional . . . problems*.
>
> Article 1, Section 9, clause 5 of the Constitution provides "no tax or duty shall be laid on articles exported from any State." . . . *Whether characterized as a tax or a fee, to the extent that such a levy is construed as primarily for the purpose of raising revenue, it is tantamount to a tax on export and in part unconstitutional.*

Report of the House Committee on Merchant Marine and Fisheries, H.R. Rep. 251 (IV), 99th Cong., 1st Sess., at 23 (1985) (emphasis added). Representative Biaggi added:

> Although I believe that the amendments adopted by the Committee to H.R. 6, substituting a cargo fee for the proposed *ad valorem* tax, convert a potentially discriminatory revenue measure to a fee for services, I continue to hold grave reservations concerning the constitutionality and policy implications of an *ad valorem* fee.
>
> First, in my judgment there is no intrinsic relationship between the imposition of a fee on cargo for port dredging services based exclusively on cargo value and the value of services provided. A tax by any other name remains a tax.

Id. at 41 (Additional View of Representative Biaggi). Similarly, Representative Thomas Foglietta also stated:

> Unfortunately, included in this cost sharing scheme are port user fees. Specifically, H.R. 6 contains a 0.04% *ad valorem* fee to be imposed on all cargoes imported, exported, or shipped between U.S. ports. . . . There are many compelling reasons why we should not impose such a user fee; *these range from the constitutionality of such a proposal* to the potential for cargo diversion and possible foreign retaliation.

Id. at 42 (Additional View of Representative Foglietta) (emphasis added). As a result of Congress's recognition that the HMT imposed on exports was unconstitutional, it added a "severability" clause to the Water Resources Development Act ("WRDA"):

> The concern of the Committee and the subject of the [severability] amendment was, for example, that the constitutional arguments that had been made *against imposing a tax on exports might result in the legislation being declared invalid* and it was the desire of the Committee to preserve all other provisions of the Act if that or a similar provision be found invalid.

Id. at 30 (emphasis added).

Although the Customs Service has consistently characterized the charge imposed on exports as a Harbor Maintenance "Fee," to this day, Congress continues to recognize that it has imposed a tax, not a fee. Numerous laws passed since the original WRDA of 1986 have referred to the HMT as a tax, not a fee. *See, e.g., Providing Amounts from the Contingent Fund of the House for the Expenses of Investigations and Studies by Certain Committees of the House*, H.R. Rep. 433, 103d Cong., 2d Sess., 1994, at 302 ("The Subcommittee will investigate the growing controversy over the . . . collection of the Harbor Maintenance Tax."); *Revenue Act of 1992*, S. Rep. 430, 102d Cong., 2d Sess., 1992, at 37 ("The IRC of 1986, as amended, provides . . . that amounts in the Harbor Maintenance Trust Fund shall be available . . . for the payment of all expenses . . . in administering Subchapter A of Chapter 36 (relating to harbor maintenance tax).");

1991 Comprehensive Oversight Initiative of the Committee on Ways and Means, H.R. Rep. 431, 102d Cong., 2d Sess., 1992, at 194 ("The [Harbor Maintenance] Trust Fund is funded by excise taxes, tolls . . . and interest on investments."); *Treatment of Cargo Within the Contiguous United States and Foreign Ports*, H.R. Rep. 732, 102d Cong., 2d Sess., at 1 ("A harbor maintenance excise tax is imposed on the use of U.S. ports. . . .").

The facts of this case differ markedly from those in cases where the Court stated that an unconstitutional claim could be time-barred. In *Tomanio*, for example, the Court ruled that an action alleging a violation of the Due Process Clause of the Fourteenth Amendment (U.S. Const. amend. XIV) was time-barred. Unlike the plaintiffs in the HMT litigation, however, the plaintiff in *Tomanio* did not challenge a law *known by* Congress to be unconstitutional. 446 U.S. at 480. Rather, it alleged that the *conduct* of various state officials violated its right to due process under the Fourteenth Amendment. *Id.*

Similarly, in *Soriano v. United States*, 352 U.S. 270 (1957), the Court ruled that an action alleging a violation of the Fifth Amendment was time-barred. However, as in *Tomanio*, the action in *Soriano* did not involve a challenge to a patently unconstitutional law. Instead, the plaintiff sought reimbursement for damages incurred when the Philippine Guerrilla Army, at the direction of the United States, took its property during WWII. 352 U.S. at 271-72.

For these reasons, this case poses a unique set of facts. The government should not be allowed to keep money it knew at the outset it was not entitled to collect merely

because the statute of limitations has lapsed. Allowing it to do so would compound the injustice committed by enactment of the law.

While statutes of limitation governing suits against the United States are manifestations of sovereign immunity, *United States v. Mottaz*, 476 U.S. 834 (1986), the government should not be allowed to hide behind the cloak of sovereign immunity as a basis for refusing to refund HMT paid by an exporter. Sovereign immunity to lawsuits is predicated on the condition that the sovereign is acting within the powers granted it by the Constitution. When the sovereign acts unconstitutionally, it should not be entitled to any immunity. *See*, Akhil R. Amar, *Of Sovereignty and Federalism*, 96 Yale L. J. 1425, 1427 (1985).

D. The Principles of the Statute of Limitations Are Not Violated By Not Applying the Statute in the HMT Litigation.

The purposes of a statute of limitations are (1) to prevent surprise and (2) to prevent the loss of evidence. *American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974). Neither of these purposes would be frustrated by this Court ordering a full refund of all HMT paid by an exporter.

First, it can hardly be said that the government would be surprised if it were ordered to refund all the HMT it collected. As amply demonstrated above, Congress, from the outset, knew that it was enacting an unconstitutional law.

Second, there has been no loss of evidence. The HMT litigation began, in large part, as a reaction to enforce-

ment of the tax via increased audits of exporters by the Customs Service, which is charged with administering and enforcing the HMT. Since the early 1990s, the Customs Service has issued scores of letters to exporters informing them that they have failed to pay the HMT. Therefore, it is clear that the government has records to quantify the amounts of HMT paid by an exporter.[3]

E. Ordering the Government to Refund All HMT Collected Will Not Have Grave Fiscal Implications.

While the government has indicated that this case raises issues of significant fiscal importance (Petition for Writ of Certiorari at 12), ordering the government to refund all HMT collected from an exporter will not have grave fiscal implications. As noted in Respondent's Opposition to the Petition for Writ of Certiorari, the HMT Trust Fund has amassed a huge surplus of $865 million as of 1996. Opposition to Petition for Writ of Certiorari at 18. The surplus is expected shortly to reach $3 billion. *Id.* at 19. Moreover, collections of the HMT on imports and intra-U.S. shipments remain unaffected by this litigation. *Id.* at 19. When coupled with the fact that many U.S. exporters have not filed suit, and that the attempt to create a class action in this litigation was denied, *Baxter Healthcare Corp. v. United States*, 925 F. Supp. 794 (Ct. Int'l Trade 1996), it is clear that the

[3] Exporters are required to pay the HMT on a quarterly basis by filing a Customs form listing all export shipments during the quarter and tendering the *ad valorem* amount due on the total value of such exports. 19 C.F.R. § 24.24(e)(2)(ii).

HMT Trust Fund will not be depleted by ordering refunds of all HMT paid by an exporter.

II.

IN THE ALTERNATIVE, REFUNDS OF ALL HMT PAID BY AN EXPORTER SHOULD BE REFUNDED BASED ON EQUITABLE RECOUPMENT.

Although to date the Court has not allowed equitable recoupment to be the sole basis for jurisdiction, *United States v. Dalm*, 494 U.S. 596 (1990), the unique facts surrounding enactment of the HMT justify ordering refunds of all HMT paid based on equitable recoupment. "[A]n action will lie whenever the defendant has received money which is the property of the plaintiff, and which the defendant is obligated by natural justice and equity to refund." *United States v. State Bank*, 96 U.S. 30, 35 (1877). This purpose would be clearly served by ordering the United States to refund taxes it collected in violation of exporters' natural rights. "The United States cannot, as against the claim of an innocent party, hold his money which has gone into its treasury . . . ." *Bull v. United States*, 295 U.S. 247, 261 (1935).

CONCLUSION

For the reasons stated above, *amici curiae* Baxter Healthcare Corporation, Clark Oil Trading Company, IBP, Inc., Motorola, Inc., Perseco Asia-Pacific LLC, and Stone Container Corporation respectfully request that the Court affirm the lower court's judgment that the HMT is unconstitutional and order the lower court to

direct Customs to refund all HMT paid by exporters who have commenced an action contesting HMT deposits.

Respectfully submitted,

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QUESTION PRESENTED

Amici will address the following question:

Whether the refund of a federal tax, enacted and enforced in violation of the Constitution, may be barred by the application of a statute of limitations.

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In The Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-372

UNITED STATES OF AMERICA, PETITIONER,

v.

UNITED STATES SHOE CORPORATION, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR NEW HOLLAND NORTH AMERICA, INC., *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

INTERESTS OF THE *AMICI CURIAE*

Amici[1] are corporations that have a compelling interest in whether the refund of a federal tax, enacted and enforced in violation of the

[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

Constitution, may be barred by the application of a statute of limitations.[2/] *Amici* are engaged in a variety of commercial enterprises in the United States and globally. All *amici* have exported goods from the United States and have paid the harbor maintenance tax ("HMT," 26 U.S.C. § 4461) arising from these exports.

Amici address the single issue of whether all parties claiming refunds of the HMT paid on exports are properly entitled to a full refund of all the HMT paid since the date of enactment of the law imposing the HMT on exports. For the reasons stated herein, *amici* submit that they are so entitled.

Before the United States Court of International Trade ("CIT"), all three judges held that the HMT was unconstitutional. *See U.S. Shoe Corp. v. United States*, 907 F. Supp. 408, 410 (Ct. Int'l Trade 1995) (Pet. App. 46a). However, two of the three judges (DiCarlo, C.J. and Restani, J.) determined that the available remedies were limited by 28 U.S.C. § 2636(i). *U.S. Shoe Corp.*, 907 F. Supp. at 418, 421 (Pet. App. 68a, 76a). 28 U.S.C. § 2636(i) provides as follows:

[2/] The parties have consented to the filing of this brief *amicus curiae*. Letters of consent have been filed with the Clerk of the Court.

> (i) A civil action of which the Court of International Trade has jurisdiction under section 1581 of this title . . . is barred unless commenced in accordance with the rules of the court within two years after the cause of action first accrues.

Judge Musgrave, in a concurring opinion, found the statute of limitations inapplicable, stating that "imperatives of due process require a full refund back to the date of the Act's implementation . . . ." *U.S. Shoe Corp.*, 907 F. Supp. at 426 (Musgrave, J., concurring) (Pet. App. 88a).

Upon the Government's appeal from the CIT decision, several *amici curiae* argued before the United States Court of Appeals for the Federal Circuit ("CAFC") that the Government should fully refund all HMT paid since the date of enactment. The CAFC, however, declined to address this argument:

> [C]ertain of the amici . . . argue that, because the HMT is unconstitutional and therefore void *ab initio*, all monies collected since the implementation of the HMT should be refunded. As U.S. Shoe does not seek such recovery, there is no need for us to reach this issue.

U.S. Shoe Corp. v. United States, 114 F.3d 1564, 1577 (Fed. Cir. 1997) (Pet. App. 29a).

Amici respectfully submit that this issue is properly before this Court for consideration, and would be appropriately addressed by this Court, for the following reasons. First, given the constitutional and fiscal issues raised by the issue of a full refund, this issue is one that is likely to come before this Court eventually. It would promote the conservation of scarce judicial resources if this Court, the most appropriate for ultimate resolution of this issue, were to decide this issue at the instant stage of litigation, rather than requiring the parties to begin the litigation process anew at the CIT. Second, the issue presented in this brief is purely a question of law. Third, numerous companies, including the *amici* in this brief, requested a full refund of the HMT in their complaints before the CIT. *See U.S. Shoe Corp.*, 907 F. Supp. at 421 n. 1 (Musgrave, J., concurring) (Pet. App. 76a). These companies' actions were stayed pending the ultimate resolution in United States Shoe Corporation's action, which was designated as a test case. Fourth, the concurring opinion of Judge Musgrave in the decision of the CIT was devoted to the issue of whether a full refund of all the HMT paid on exports since the date of enactment was appropriate. *See U.S. Shoe Corp.*, 907 F. Supp. at 421 (Musgrave, J., concurring) (Pet. App. 76a). Fifth, the Government addressed this

issue in its appellate brief before the CAFC in this appeal. CAFC Brief of Defendant-Appellant United States at 13-14 n.10 (July 10, 1996). For the foregoing reasons, the Court should address the issue presented in this brief.

The HMT is unconstitutional for the reasons expressed in the decision of the CAFC in *U.S. Shoe Corp.*, 114 F.3d 1564 (Pet. App. 1a-45a) and by the CIT in *U.S. Shoe Corp*, 907 F. Supp. 408 (Pet. App. 46a-89a). Furthermore, *amici* adopt herein the argument on the issue of constitutionality presented to the Court in the brief of the United States Shoe Corporation.

SUMMARY OF ARGUMENT

The HMT was enacted, and is enforced, in violation of the Constitution. The HMT is, therefore, void *ab initio*, and confers neither rights nor immunities. Due process jurisprudence directs that the refund of a federal tax enacted and enforced in violation of the Constitution may not be barred by the application of a statute of limitations when such application would be unconstitutional. The Fifth Amendment protects persons from the deprivation of property without due process by the Government, just as the Fourteenth Amendment offers similar protection against actions by states. There is no precedent to support the unconstitutional application of a statute of

limitations to deny recovery of federal taxes exacted by compulsion in violation of the Constitution. The *dictum* in decisions decided under the principles of federalism and comity addressing the unconstitutional application of state tax laws is not relevant.

In addition, the equities require the non-application of the statute of limitations because to do otherwise would not provide the meaningful, backward-looking relief required in this case. The Government has not "relied" on the constitutionality of the HMT so as to preclude a full refund of the HMT. Full relief would not disrupt or burden the Government and would not burden taxpayers. The Government should not be unjustly enriched from an unconstitutional statute. The purposes of statutes of limitations would not be served by application in this case. Indeed, the non-application of the statute of limitations is necessary to deter similar future incursions into protected constitutional rights.

ARGUMENT

I. THE UNCONSTITUTIONAL HMT IS VOID *AB INITIO*.

The determinations by the CAFC and CIT that the HMT is unconstitutional render the HMT void *ab initio*. *See Chicago, I. & L. R. Co. v. Hackett*, 228

U.S. 559, 566 (1913) ("[A]n invalid exercise of the power of Congress . . . [is] as inoperative as if it had never been passed . . . ."); *Fairbank v. United States*, 181 U.S. 283, 286 (1901) ("The particular phraseology of the Constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the Constitution is void . . . .") (citations omitted); *Ex Parte Siebold*, 100 U.S. 371, 376 (1879) ("An unconstitutional law is void, and is as no law.").

An unconstitutional statute which is void *ab initio* confers neither rights nor immunities and imposes no duties or obligations. *See Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 760 (1995) (Scalia, J., concurring) ("[W]hat a court does with regard to an unconstitutional law is simply to ignore it . . . ."); *Chicago, I. & L. R. Co.*, 228 U.S. at 566 ("[A]n unconstitutional act is not a law, and can neither confer a right or immunity nor operate to supersede any existing valid law."); *Norton v. Shelby County*, 118 U.S. 425, 442 (1886) ("An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation as inoperative as though it had never been passed."); *Osborn v. Bank of the United States*, 9 Wheat. (22 U.S.) 738, 837 (1824) (It is an "extravagant proposition, that a void act can afford protection to the person who executes it . . . .").

Supreme Court precedent directs that decisions on Constitutional questions must be given retroactive effect. *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993) (recognizing a general rule of retrospective effect for the constitutional decisions of the Supreme Court). Therefore, a decision that a tax is unconstitutional must be given retroactive effect, and the remedies available to the taxpayer may not be limited by a merely prospective application of that decision. *See Reynoldsville*, 514 U.S. at 760 (Scalia, J., concurring) ("[I]f a plaintiff seeks the return of money taken by the government in reliance on an unconstitutional tax law, the court ignores the tax law, finds the taking of the property therefore wrongful, and provides a remedy."); *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *McKesson Corp. v. Division of Alcoholic Beverages and Tobacco*, 496 U.S. 18 (1990). In rejecting prospective relief as insufficient, these decisions confirm that when a law is declared unconstitutional, it is void *ab initio*, and, therefore, all actions committed pursuant to that law are similarly void and must be undone.

Due process mandates that the Government "undo" an unconstitutional tax by providing a refund. In *McKesson*, in response to the question of whether "prospective relief, by itself, exhausts the requirements of federal law," the Court determined that:

> [t]he answer is no: If a State places a taxpayer under duress promptly to pay a tax when due and relegates him to a postpayment refund action in which he can challenge the tax's legality, the Due Process Clause of the Fourteenth Amendment obligates the State to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.

McKesson, 496 U.S. at 31 (footnote omitted). Therefore, the Court must do more than declare that the HMT is void *ab initio*; the Court must also ensure that the Government will provide meaningful backward-looking relief.

The HMT is unconstitutional and is, therefore, void *ab initio*, conferring neither rights nor immunities. To ensure that the HMT is indeed treated as void from its inception, the Court must make certain that the Government provides the only meaningful backward-looking relief available – a full refund of all unlawfully collected HMT.

II. THERE CAN BE NO LAWFUL STATUTE OF LIMITATIONS FOR A REFUND OF A FEDERAL TAX ENACTED AND ENFORCED IN VIOLATION OF THE CONSTITUTION.

A. A Denial Of A Full Recovery Of Taxes Exacted By Compulsion In Violation Of The Constitution Is Itself In Contravention Of The Constitution.

The Fifth and Fourteenth Amendments guarantee that no person shall be deprived of life, liberty, or property, without due process of law. The Due Process Clause of the Fifth Amendment provides at least the same rights and protections as does the Due Process clause of the Fourteenth Amendment. *See, e.g., DeShaney v. Winnebago County Dep't of Social Services*, 489 U.S. 189, 196 (1989) ("Like its counterpart in the Fifth Amendment, the Due Process Clause of the Fourteenth Amendment was intended to prevent government 'from abusing [its] power, or employing it as an instrument of oppression . . . .'") (citations omitted).

The Due Process Clauses of the Fifth and Fourteenth Amendments protect against the unconstitutional deprivation of property. The collection of taxes implicates a property interest within the meaning of the Fifth and the Fourteenth

Amendments. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673 (1930).

Accordingly, a denial of a full recovery of taxes exacted by compulsion in violation of the Constitution is itself a violation of the Constitution.[3/] *See Reich v. Collins*, 513 U.S. 106, 109 (1994) ("'[A] denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment,' . . . .") (citations omitted); *Ward v. Love County*, 253 U.S. 17, 24 (1920) ("To say that the county could collect these unlawful taxes by coercive means and not incur any obligation to pay them back is nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process of law. Of course this would be in contravention of the Fourteenth Amendment".).

Due process therefore mandates that there be a "'clear and certain' remedy for taxes collected in

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[3/] The HMT is a tax exacted by compulsion. An exporter or shipper who fails to pay the HMT is subject to penalties in the form of financial sanctions. 19 C.F.R. § 24.24(h) (1995). *See McKesson*, 496 U.S. at 38 n.21 ("We have long held that, when a tax is paid in order to avoid financial sanctions or a seizure of real or personal property, the tax is paid under 'duress' in the sense that the State has not provided a fair and meaningful predeprivation procedure.").

violation of federal law." *Reich*, 513 U.S. at 108. Where there is no provision for predeprivation relief in the event of an unconstitutional tax, the postdeprivation remedy must satisfy the due process requirements of the Constitution. *See McKesson*, 496 U.S. at 38-39. Postdeprivation relief for an unlawful tax must provide meaningful backward-looking relief. *See Harper*, 509 U.S. at 101. To satisfy the Due Process Clause, the postdeprivation remedy must not only provide petitioner with "an opportunity to contest the validity of the tax," but it must also provide a "'clear and certain remedy' designed to render the opportunity meaningful by preventing any permanent unlawful deprivation of property." *McKesson*, 496 U.S. at 40.

In particular, the application of a statute of limitations is subject to Constitutional restrictions. *See Beam*, 501 U.S. at 535 ("Subject to possible constitutional thresholds . . . the remedial inquiry is one governed by state law, at least where the case originates in state court.") (emphasis added) (citations omitted). Indeed, a statute of limitations may not be applied if that application violates the Constitution. *See Reynoldsville*, 514 U.S. at 756 ("But what if a pre-existing, separate, independent rule of state law . . . a rule containing certain procedural requirements for any refund suit -- nonetheless barred the taxpayers' refund suit? . . . Depending upon whether or not this independent

rule satisfied other provisions of the Constitution, it could independently bar the taxpayers' refund claim.") (emphasis added) (citations omitted).

In this case, the application of any statute of limitations to bar a full recovery of all HMT unlawfully collected would violate the Due Process Clause. Indeed, to allow the Government to keep the unconstitutionally collected HMT by application of a statute of limitations would permit the Government to violate the Constitution a second time. Such application would not provide an adequate and fair remedy to the unconstitutional exaction of the HMT. To the contrary, it would entail the "permanent unlawful deprivation of property."

Therefore, the Government should not be permitted to collect the unconstitutional HMT and then rely on a statute of limitations to bar a full refund of the HMT, since such reliance would compel an unconstitutional result.

B. There Is No Precedent To Support The Application Of Statutes Of Limitations To Deny Recovery Of Federal Taxes Exacted By Compulsion In Violation Of The Constitution.

No precedent supports the application of a statute of limitations to bar the refund of federal taxes exacted by compulsion in violation of the

Constitution. *See U.S. Shoe*, 907 F. Supp. at 426 (Musgrave, J., concurring) (Pet. App. 88a). As discussed above, due process jurisprudence directs that there can be no lawful application of a statute of limitations to a refund of a federal tax enacted and enforced in violation of the Constitution.

Decisions which do not address the remedy which is constitutionally required as a consequence of the *ab initio* unconstitutionality of a federal tax statute are not relevant. *See, e.g., Block v. North Dakota*, 461 U.S. 273 (1983); *Lunaas v. United States*, 936 F.2d 1277 (Fed. Cir. 1991) (*en banc*), *cert. denied*, 502 U.S. 1072 (1992). Neither *Block* nor *Lunaas* addresses the implications of an unconstitutional statute. Nor do *Block* and *Lunaas* address the question of whether the Government may retain revenue exacted pursuant to an unconstitutional statute. Rather, they address plaintiffs' assertion of constitutional rights, and whether such rights are subject to procedural limitations, the constitutionality of which is left undiscussed. As the discussion in these cases is inapposite to the question of the remedy constitutionally required as a consequence of an unconstitutional law, these cases are irrelevant.

Similarly, the *dictum* in decisions decided under the principles of federalism and comity addressing the unconstitutional application of state tax laws is not relevant. Although the rule of law of

McKesson, that due process obligates a government to provide meaningful backward-looking relief to rectify any unconstitutional deprivation, governs the instant action, the *dictum* in *McKesson* concerning the application of that rule of law is not relevant.[4] *See Reynoldsville*, 514 U.S. at 754-755 ("[The] remedy . . . depend[s] -- like almost all legal issues -- upon the kind of case, matter, and circumstances involved. Not all cases concerning retroactivity and remedies are of the same sort.").

The *dictum* in *McKesson*, speculating that the state might "enforce relatively short statutes of limitations applicable to such actions," *McKesson*, 496 U.S. at 45, is completely inapplicable to the "case, matter, and circumstances involved" in the instant action. *McKesson* was decided on the basis of principles of federalism, comity, and the traditional federal deference to state tax administration:

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[4] There is a similar *dictum* in other Supreme Court decisions concerning the application of the *McKesson* rule of law to a state statute. *See Reich*, 513 U.S. at 114; *Beam*, 501 U.S. at 545; *Reynoldsville*, 514 U.S. at 755. However, as with *McKesson*, this *dictum* must be read in light of the "strong background presumption against interference with state taxation . . . ." *National Private Truck Council v. Oklahoma Tax Comm'n*, 515 U.S. 582, 590 (1995). This presumption is present in *Reich*, *Beam*, and *Reynoldsville*, but not in the instant case.

> We have long recognized that principles of federalism and comity generally counsel that courts should adopt a hands-off approach with respect to state tax administration.
>
> . . . .
>
> The reluctance to interfere with state tax collection continued in [*McKesson*], in which we confirmed that the States are afforded great flexibility in satisfying the requirements of due process in the field of taxation.

National Private Truck Council v. Oklahoma Tax Comm'n, 515 U.S. 582, 586-587 (1995) (emphasis added); *see also Harvard Law Review Association, The Supreme Court, 1989 Term: Leading Cases*, 104 Harv. L. Rev. 188, 194 (1990) ("[*McKesson*] may represent the greatest deference to state interests permissible in a regime that requires the vindication of federal rights."). In the instant action, there are no state interests present, and there is no corollary requirement for comity or federal deference to state interests.

The *dictum* in *McKesson* should be further distinguished because *McKesson* addressed the unconstitutional enforcement of an otherwise constitutional tax. In contrast, the remedy in the instant action must address the unconstitutionality *ab initio* of a statute. The inapplicability of this

dictum to situations of *ab initio* unconstitutionality is discussed in *McKesson*:

> Had the Florida courts declared the Liquor Tax invalid either because (other than its discriminatory nature) it was beyond the State's power to impose . . . or because the taxpayers were absolutely immune from the tax . . . no corrective action by the State could cure the invalidity of the tax during the contested tax period. The State would have had no choice but to "undo" the unlawful deprivation by refunding the tax previously paid under duress, because allowing the State to "collect these unlawful taxes by coercive means and not incur any obligation to pay them back . . . would be in contravention of the Fourteenth Amendment."

McKesson, 496 U.S. at 39 (emphasis added), *citing Ward*, 253 U.S. at 24, and *Carpenter v. Shaw*, 280 U.S. 363, 369 (1930).

III. THERE ARE COMPELLING REASONS WHY 28 U.S.C. § 2636(i) SHOULD NOT BE APPLIED.

A. 28 U.S.C. § 2636(i) Does Not Provide Meaningful, Backward-Looking Relief Given This Case, Matter, And Circumstances Involved.

Application of 28 U.S.C. § 2636(i) to the unique circumstances of this action is contrary to the rule of law established by the Court. The Court has said that a remedy must be tailored to meet the facts of a case. *Reynoldsville*, 514 U.S. at 754-755 ("[The] remedy . . . depend[s] -- like almost all legal issues -- upon the kind of case, matter, and circumstances involved."). The Court has further stated that such remedy must provide meaningful, backward-looking relief "consistent with due process and our *McKesson* line of cases." *Reich*, 513 U.S. at 114. Further, an "independent rule" can be applied to limit this relief only if such rule "satisfied . . . the Constitution . . . ." *Reynoldsville*, 514 U.S. at 756.

Application of § 2636(i) in the instant action is neither "consistent with due process," nor would it allow the Court to provide the "meaningful, backward-looking relief" required by the rule of law in *McKesson*. No statute of limitations would satisfy the due process requirements of the Constitution in the context of a federal taxation

statute that is unconstitutional *ab initio*. Further, "meaningful relief" in the instant action can mean only one thing -- a full refund of all taxes exacted pursuant to the unconstitutional HMT. This is the only remedy that accords fully with the determination of the CIT that the HMT is unconstitutional. The application of the arbitrary two-year period imposed by § 2636(i) to the reasoned determination of the Court holding the HMT unconstitutional would mechanically serve to deprive the Court's holding of its constitutionally necessary "meaning." Further, such a mechanical application in this "kind of case, matter, and circumstances" would automatically remove from the Court the ability to provide the full relief required by the Constitution.

B. The Equities Require The Non-Application Of 28 U.S.C. § 2636(i).

The Court may consider individual equities to determine that a full refund of all HMT is the proper remedy in this case. *Beam*, 501 U.S. at 543-544 ("[N]othing we say here precludes consideration of individual equities when deciding remedial issues in particular cases."). *See also McKesson*, 496 U.S. at 44 (rejecting two equitable considerations offered by the state as grounds for denying retrospective relief because "neither is sufficient to override the constitutional requirement that [the state] provide retrospective relief . . . .").

The specific equities in this case require a full refund of all taxes paid pursuant to the HMT statute.

First, the Government did not "rely" upon the constitutional validity of the HMT so as to preclude a full refund of all taxes exacted pursuant to the unconstitutional HMT. Rather, the Government has known, since before the enactment of the HMT, that the HMT was potentially unconstitutional. The *Water Resources Development Act of 1986*[5/] ("WRDA"), which includes the HMT, contains a severability clause at 33 U.S.C. § 2304 (Supp. 1996). In 1985, the House of Representatives Merchant Marine and Fisheries Committee, one of four House Committees considering the House version of the bill, decided to include the severability clause in the WRDA, because of its serious concerns that the HMT on exports might be found unconstitutional:

> Lastly, Mr. Bateman's amendment [§ 116, to add the severability clause] would provide for severability should any of the provisions of section 110 [the HMT] be found unconstitutional or invalid for other reasons. The concern of the Committee and the subject of the amendment was, for

5/ Pub.L. No. 96-662, 100 Stat. 4082 (codified as amended in scattered titles of U.S.C.).

> example, that the constitutional arguments that had been made against imposing a tax on exports might result in the legislation being declared invalid . . . .

H.R. Rep. No. 251, 99th Cong., 1st Sess., pt. 4, at 30 (1985) (emphasis added). In his additional views, Rep. Biaggi (Chair of Merchant Marine Subcommittee of Merchant Marine and Fisheries Committee) offered the following comments:

> I continue to hold grave reservations concerning the constitutionality . . . of an ad valorem fee . . .
>
> . . . .
>
> A tax by [sic] under any other name remains a tax. The research performed, by and at the Committee's request, only strengthens my convictions in this regard.

Id. at 41. *See also, id.* at 23, 24, 29, and 42; 131 Cong. Rec. 30750 (1985) (remarks of Rep. Biaggi during House debate).

Given this express language in the legislative history of the HMT and the direct contravention of an express constitutional prohibition forbidding Congress from laying duties or taxes on exports, the Government has not "relied" on the constitutionality of the HMT in enacting the HMT

and in enforcing the unconstitutional collection of HMT. Nor has the Government "relied" on the traditional presumption that legislation is valid. Rather, the Government can now "hardly claim surprise" at the unconstitutionality of the HMT. *See McKesson*, 496 U.S. at 46.

Second, a full refund of all taxes exacted pursuant to the unconstitutional HMT statute would not disrupt the Government's legitimate interest in orderly and predictable tax administration. Any such concern would be "misplaced," *U.S. Shoe*, 907 F. Supp. at 426, (Musgrave, J., concurring) (Pet. App. 88a), in light of the actual circumstances surrounding the administration of the HMT. By the end of fiscal year 1994, the fund created by the WRDA, in which the HMT is collected and maintained, had collected $2.7 billion since the enactment of the WRDA, $700 million of which was due to the unconstitutional export taxes. *U.S. Shoe Corp.*, 114 F.3d at 1567 (Pet. App. 4a). Of the $2.7 billion collected, there was a surplus of $453 million at the end of fiscal 1994, which will increase to almost $1.7 billion by the end of fiscal year 1999. *U.S. Shoe Corp.*, 907 F. Supp. at 426 (Musgrave, J., concurring) (Pet. App. 88a-89a). Under these circumstances, a full refund of all taxes exacted pursuant to the unconstitutional HMT would not disrupt the Government's interests. Further, given the certainty of the current and future surpluses in the HMT trust

fund, full relief would not financially burden the Government or taxpayers.

Third, any remedy other than a full refund of all taxes exacted pursuant to the unconstitutional HMT would constitute an unjust enrichment of the Government. *See Harvard Law Review Association*, 104 Harv. L. Rev. at 197 ("[B]ecause the denial of a refund for an unconstitutional tax would constitute unjust enrichment, the arguments in favor of compelling an adequate remedy for unconstitutional taxes are particularly compelling."), *citing* Wolcher, *Sovereign Immunity and the Supremacy Clause: Damages Against States in Their Own Courts for Constitutional Violations*, 69 Cal. L. Rev. 189, 310 (1981) ("The action in substance presents a claim of unjust enrichment against the state that does not threaten the integrity of its general revenues."). Such unjust enrichment is easily and appropriately avoided by a full refund of all HMT paid.

C. The Purposes Of Statutes Of Limitations Would Not Be Served By Application In This Case.

It would be inconsistent with the purposes of statutes of limitations to apply 28 U.S.C. § 2636(i) in this action. Statutes of limitations are designed generally for two purposes: to ensure fairness to defendants and to notify them of claims that they

must defend before the claims grow stale. *See Burnett v. New York Cent. R. Co.*, 380 U.S. 424, 428 (1965).

The application of § 2636(i) in the instant action would serve neither of the two traditional purposes of a statute of limitations. First, it is not "unfair" to the Government to hold it accountable for its actions undertaken in express contemplation of unconstitutionality. In light of Congress' recorded doubt of the HMT's constitutionality, the Government has been on notice that the HMT was potentially unconstitutional since before it was enacted in 1987. See discussion at III.B., *supra*. Second, the HMT refund claims are not "stale." As demonstrated by the thorough and reasoned opinions of the CAFC and CIT, evidence has not been lost, memories have not faded, and witnesses have not disappeared. *See, e.g., American Pipe & Construction Co. v. Utah*, 414 U.S. 538, 554 (1974). Thus, the purposes behind statutes of limitations do not require the application of § 2636(i) in this case.

D. The Non-Application Of 28 U.S.C. § 2636(i) Is Necessary To Deter Similar Future Incursions Into Protected Constitutional Rights.

The Constitution is the highest law of the land. *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803). A Government violation of the sort in the instant

action, namely a law enacted in direct contravention of the Constitution, is the most serious constitutional infraction. Such a serious intrusion upon the Constitution cannot be trivialized, and should not be minimized by the artificial application of a statute of limitations to shield the Government from its constitutional wrongdoing. Rather, the Government's action must be remedied and deterred through the award of meaningful, backward-looking relief.

Such relief, in the form of a full refund of all the HMT exacted, would serve two important purposes. First, it would insure that, in this case, the Government does not retain any of the HMT that it has collected by its unconstitutional action. In other words, the Government must be deprived of not some -- but all -- of its ill-gotten gains. Second, the full refund would serve to deter the future enactment of similarly unconstitutional laws. In particular, it would force the Government to take seriously the doubts expressed about the constitutionality of a bill as it moves through the Congress.

CONCLUSION

The determination that the HMT is unconstitutional must be given its full effect. The Constitution requires that the remedy for this violation must be the full refund of all taxes exacted

pursuant to this unconstitutional law. The Constitution directs against the imposition of any statute of limitations if, as in this case, it would result in a further violation of the Fifth Amendment right to due process. Further, the application of 28 U.S.C. § 2636(i) is additionally proscribed given the facts and circumstances of this case because it would artificially deprive any remedy granted of "meaning" and it would lead to an inequitable result.

Respectfully submitted.

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January 15, 1998

No. 97-372

(13)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

—v.—

UNITED STATES SHOE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR *AMICI CURIAE* TEXACO REFINING AND MARKETING, INC., ET AL. SUBMITTED IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether a tax on exports, levied as an *ad valorem* duty on their export sales price and assessed at point of exportation, violates the Export Clause of the Constitution.

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-372

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES SHOE CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR AMICI CURIAE
TEXACO REFINING AND MARKETING, INC., et al.

INTEREST OF AMICI

Amici curiae Texaco Refining and Marketing, Inc., *et al.* (as listed on annex A hereto), respectfully submit this brief in support of respondent United States Shoe Corporation. Like respondent, *amici* are exporters of goods who have paid substantial *ad valorem* taxes levied as duties directly at point of export and seek recovery of such taxes on the ground that they were unconstitutionally assessed in violation of the prohibitions in the Export Clause of the United States Constitution. Counsel for *amici* have actively participated at all stages of the proceedings below, including oral argument before the Court of International Trade, and they file this brief with the written consent of all the parties.

SUMMARY OF ARGUMENT

This case presents the simple issue of whether a tax on exports, levied as an *ad valorem* duty on their export sales price and assessed at point of exportation, violates the United States Constitution's express prohibition forbidding Congress from laying taxes or duties on exports. The Court of International Trade in a unanimous three judge opinion and the Federal Circuit in a 4-1 decision both came to the unremarkable conclusion that such a tax is unconstitutional.

That conclusion is neither novel nor controversial. It is consistent with over 80 years of precedent -- precedent this Court re-examined and reaffirmed just one year ago in *United States v. International Business Machines Corporation*, __ U.S. __, 116 S. Ct. 1793 (1996) ("*IBM*"). In *IBM*, this Court held that the Export Clause's prohibition means exactly what it says (116 S.Ct. at 1802), that it specifically prohibits Congress from regulating commerce through export taxes (*id.*) and that changing views of the scope of Congress' powers under the Commerce clause "should not, and indeed cannot" govern its consistent interpretation of the Export Clause's clearcut prohibition (*id.* at 1799).

IBM, and the longstanding precedent it discussed and reaffirmed, mandate but one conclusion: the Harbor Maintenance Tax is unconstitutional. The decision below should be affirmed.

ARGUMENT

The Harbor Maintenance Tax Violates the Export Clause of the Constitution

The imposition of any tax or duty on exports is expressly prohibited by the Export Clause of the U.S. Constitution. As this Court held in *IBM*, the Constitution says it "simply and directly": "No Tax or Duty shall be laid on Articles exported from any State." 116 S.Ct. at 1796, citing U.S. CONST., ART. I, §9, cl.5.

As this Court further observed in *IBM*, the history of that language's adoption is clear: the Framers knew they were adopting a broad prohibition and explicitly rejected a series of proposals which would have limited its scope. *Id.* at 1803 ("There is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language"); *see also* Madison, NOTES OF DEBATES IN THE FEDERAL CONVENTION OF 1787 at 499-503 (Ohio University Press 1984).

A series of court cases, starting with *Fairbank v. United States*, 181 U.S. 283 (1901), have consistently struck down the rare instances where Congress has transgressed the Constitution's simple and explicit limitation on its sovereign power:

> " The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.'"

181 U.S. at 290 (declaring unconstitutional a tax on bills of lading for exported goods).[1]

The harbor maintenance tax ("HMT") at issue here is clearly denominated as a tax, calculated *ad valorem* on the value of goods as declared in the shipper's export declaration and imposed as a duty at the point those goods are loaded on the export vessel.[2] As such, it is a direct violation of the

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[1] *See also United States v. Hvoslef*, 237 U.S. 1 (1915) (voiding tax on charter parties, holding that the Export Clause was "designed to give immunity from taxation to property that is in the actual course of exportation"); *Thames & Mersey v. United States*, 237 U.S. 19 (1915) (voiding tax on marine insurance policies, stating that proper inquiry is whether tax is "so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon exportation," and holding that insurance was such an essential element to exportation that a tax on insurance amounted to a tax on the goods themselves); *A. G. Spalding Bros. v. Edwards*, 262 U.S. 66 (1923) (voiding sales tax on exports of baseball equipment, even though it also applied to domestic sales, noting that the triggering event for the tax was delivery to the carrier at which point the goods were in the course of export and the constitutional prohibition applied).

[2] 26 U.S.C. §§ 4461(c)(2)(A) (HMT is incurred at time of loading), 4462 (a)(5)(A) (HMT based on the value of goods as determined by the standard commercial export documentation). *See also* 19 C.F.R. § 24.24 (e)(2)(i) ("The fee is based upon the value of the shipment loaded as required to be indicated on the SED [Shipper's Export Declaration] or equivalent documentation"), 15 C.F.R. § 30.7 (SED declared value is export sale price).

Export Clause and a practice specifically declared by *Fairbank* and its progeny to be unconstitutional:

> "If mere discrimination between the States was all that was contemplated, it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this prohibition Congress can impose an export tax neither on one article of export, nor on all articles of export."

181 U.S. at 292. *See also A.G. Spalding, supra.*

Fairbank further held that the broad limitation imposed by the Export Clause could not be circumvented by nominally imposing a tax upon exports under another constitutional grant of power:

> "We are not here confronted with a question of the extent of the powers of Congress, but one of the limitations imposed by the Constitution on its action . . . . where prohibition or limitation is placed upon the power of Congress that prohibition or limitation should be enforced in its spirit and to its entirety." *Id.* at 288-89.

The government's appeal would have this Court accept that *Fairbank* has been overtaken by Commerce Clause jurisprudence and a gloss of user fee cases flowing from *Massachusetts v. United States*, 435 U.S. 444 (1978). But not one of those user fee cases involved a tax, duty, or

even a fee on exports. Not one of those cases had occasion to consider the express, flat prohibition of the Export Clause. In short, not one of those cases has in any way articulated a holding that would change this Court's consistent interpretation and application of the Export Clause's broad prohibition.[3]

Just the Term before last, this Court in *IBM* resoundingly reaffirmed *Fairbank*, stating that *Fairbank* made it clear that "the Export Clause *strictly* prohibits *any* tax or duty, discriminatory or not, that falls on exports during the course of exportation." 116 S. Ct. at 1797 (emphasis added). This Court explained that the bill of lading tax in *Fairbank*, "though not directly imposed on the goods being exported" was nevertheless "'in effect a duty on the article transported'" (quoting *Fairbank*) and hence "fell directly into the category of forbidden taxes." *Id.*

And this Court concluded by quoting with approval the key holding of *Fairbank*:

> "'The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.' Whether such provision is or is not wise is a question of policy with which the Courts have

[3] Indeed, the only case cited by the government ever to uphold, over an Export Clause challenge, a fee imposed in connection with the export of goods was *Pace v. Burgess*, 92 U.S. 372 (1875), where the fee was the 25 cent administrative cost of an identifying stamp imposed so that tobacco destined for export would *not* be taxed.

> nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress....'"

IBM, 116 S.Ct. at 1797, quoting *Fairbank*, 181 U.S. at 290.

IBM was relied upon heavily by both Courts below. Yet tellingly, the government's brief contains not a mention of *IBM*, of its explicit reaffirmation of the broad prohibition of the Export Clause, or of *IBM*'s further declarations that:

- the Export Clause does not permit "the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit" (116 S Ct. at 1795)

- a non-discriminatory tax placed on goods being delivered to a carrier cannot constitutionally be applied to an export sale (*Id.* at 1798, citing *A.G. Spalding*, *supra*, a case also not cited by the government in its brief here)

- the term "tax" is not sufficiently ambiguous that "we may ignore its common, and usually expansive meaning" (116 S. Ct. at 1802)

- the Export Clause "specifically prohibits Congress from regulating international commerce through export taxes" (*Id.* at 1802)

- "the remedial provision that became the Export Clause does not have a narrow focus" and "there is

substantial evidence from the Debates that proponents of the [Export] Clause fully intended the breadth of scope that is evident in the language." *Id.* 1802, 1803.

Finally, in *IBM* this Court explained that just because readings of the Commerce Clause have become more expansive over the years does not mean that the explicit prohibition on taxes set forth in the Export Clause is now equally fluid and must bow to legislative judgment:

> " Our decades-long struggle over the meaning of the nontextual negative command of the dormant Commerce Clause does not lead to the conclusion that our interpretation of the Export Clause is equally fluid. At one time the Court may have thought that the dormant Commerce Clause required a strict ban on state taxation of interstate commerce, but the text did not require that view. *The test of the Export Clause, on the other hand, expressly prohibits Congress from laying any tax or duty on exports.* These textual disparities strongly suggest that *shifts in the Court's view of the scope of the dormant Commerce Clause should not, and indeed cannot govern our interpretation of the Export Clause.*" *Id.* at 1799 (emphasis added).

This passage was specifically cited and quoted by the appellate court below in this case in rejecting the same "user fee" argument the government makes here again based on *United States v. Sperry Corp.*, 493 U.S. 52 (1989).

Specifically, the Federal Circuit noted that although a "fair approximation of use" might allow a *fee* to survive a claim that it was in violation of the Constitution's Just Compensation Clause (the issue in *Sperry*), the *Sperry* court had to distinguish a case holding registration and axle *taxes* unconstitutional under the Commerce Clause by stating that the Just Compensation Clause analysis was less strict than the analysis which would be applied to the Commerce Clause's prohibition against discrimination in interstate commerce. And, the Federal Circuit went on, "to this we would add that, per *IBM*, the Export Clause is still more restrictive." *United States Shoe Corporation v. United States*, 114 F.3d 1564 at 1573 (Fed. Cir. 1997).

Quite simply, the power to regulate commerce cannot override the Export Clause, as the Supreme Court held in *North American Co. v. SEC*, 327 U.S. 686, 704-05 (1946)[4], another relevant case cited by the court below (*see* 114 F.3d at 1575) but not cited by the government in its brief. And it certainly cannot override the Export Clause where the tax at issue strikes to the very core of that Clause's prohibition: a prohibition against taxes or duties assessed on the goods themselves.

Indeed, what the government fails to acknowledge on this appeal is not only the broad prohibition of the Export

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[4] "For nearly one hundred and twenty-five years, this Court has recognized that the power of Congress over interstate commerce is the power to regulate....This is not to say, of course, that Congress is an absolute sovereign. *It is limited by express provisions in other parts of the Constitution, such as Section 9 of Article I....*" 327 U.S. at 704 (emphasis added).

Clause, but the fact that this Court has consistently recognized that there is a core area of application when the Constitution prohibits export taxes. Thus, in *Thames & Mersey v. United States*, 237 U.S. 19, 35 S.Ct. 496 at 498 (1915), involving the Export Clause, the issue was whether the tax was "so directly and closely related to the 'process of exporting' that the tax is in substance a tax upon the exportation and hence within the constitutional prohibition." In *Dept. of Revenue of Washington v. Washington Stevedoring Companies, et al.*, 435 U.S. 734 (1978), this Court extracted from *Fairbank*, *Thames & Mersey*, and a number of other cases a principle that while *State* taxes upon export-related services such as stevedoring might be sustainable despite the prohibitions of the *Import-Export Clause*, taxes upon goods in the course of export transit assessed directly on their value are not. 435 U.S. at 755-57.

The *IBM* case continued to recognize this core principle developed in Import-Export Clause jurisprudence. *See, e.g.*, 116 S.Ct. at 1800. And the Court in *IBM* flatly and unequivocally held that this core principle is equally applicable when the Export Clause is involved, absolutely prohibiting an assessment levied *ad valorem* on the goods themselves:

> "We conclude that the Export Clause does not permit assessment of nondiscriminatory federal taxes on goods in export transit."

116 S. Ct. at 1804.

Indeed, *IBM* further noted that because the constitutional prohibition set forth in the Export Clause is

stricter than the Import-Export prohibition (116 S.Ct. at 1801-02) judicial application of the Export Clause's prohibition has been *even greater* in scope:

> "This Court has never held that the Export Clause prohibits only direct taxation of goods in transit....In *Fairbank*, *Hvoslef* and *Thames & Mersey*, we struck down taxes that were not assessed directly on goods in export transit but which the Court found to be effectively a tax on the goods themselves. We have never repudiated that principle, but neither have we ever carefully defined how we decide whether a particular federal tax is *sufficiently related to the goods or their value to violate the Export Clause*." 116 S.Ct. at 1800-01 n.4 (emphasis added).

However, the government in *IBM* elected not to address the issue of whether a tax on an export insurance policy (presumably correlating in some manner to value of the insured goods being exported) was close enough to be an effective tax on the goods in export themselves. *Id.* at 1800. Accordingly, the Court in *IBM* decided that "the question whether a particular assessment on an activity or service is so closely connected to the goods as to amount to a tax on the goods themselves must await another day." *Id.* at 1804.

This case does not present that "other day." Nor does it present the issue of how far the Export Clause's prohibition extends beyond the core principle prohibiting direct taxation of the goods in transit themselves, or the question of when a tax is "so connected to the goods as to

amount to a tax on the goods themselves." Rather, the Harbor Maintenance Tax *is* a tax on the goods themselves.

Specifically, the Harbor Maintenance Tax is a direct tax on goods in export transit, assessed on their export sales value and due at the point they go over the rail onto an oceangoing vessel. *As such, the Harbor Maintenance Tax is a tax that strikes to the quick -- to very heart and core of the Constitution's Export Clause prohibition as consistently recognized in the case law and reaffirmed in IBM.*

Amici do not believe there is -- or should be -- any "user fee" exception to this clear and simple prohibition. And if so plain and obvious a tax on exports as the Harbor Maintenance Tax could nevertheless survive muster by being called a "fee," then contrary to this Court's repeated holdings that the Export Clause is a broad prohibition on sovereign power, that prohibition would not only no longer be broad, it would be no prohibition at all. The careful distinctions and analysis of *IBM* and the issues which divided the Court over how close a tax must be before it is a prohibited tax on the goods themselves would be meaningless, for a tax on the goods themselves would no longer be prohibited. The reaffirmation of the Export Clause's textual command against any tax would ring hollow and be without substance.

As this Court held in *IBM*, "shifts in the Court's view of the scope of the dormant Commerce Clause should not, *and indeed cannot* govern our interpretation of the Export Clause." 116 S. Ct. at 1799 (emphasis added). As such, whatever the subsequent development of the constitutional interplay between the Commerce Clause and *other*

constitutional limitations, the Harbor Maintenance Tax is repugnant to the express textual prohibitions of Export Clause and cannot stand regardless of whether it might be permitted by some other provision of the Constitution.

In any event, the Harbor Maintenance *Tax* is just that, and not a "user fee," as both courts below demonstrated in their analysis of *Massachusetts v. United States*, 435 U.S. 444 (1978) and its progeny. *See United States Shoe Corporation v. United States*, 907 F. Supp. 408, 413-15 (C.I.T. 1995), *aff'd* 114 F.3d 1564, 1572-74 (Fed. Cir. 1995). The HMT makes no effort to correlate the amount of the tax to the amount of harbor use or to approximate the costs of such use.[5] It is wholly dependent upon revenues realized through export sales transactions with overseas purchasers whose purchase prices are unrelated to such use.[6] And the tax consistently results in a substantial surplus that exceeds harbor maintenance costs and is applied

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[5] Thus, for example, a shipper of a trunkload of diamonds would pay more than one exporting a tanker-full of coal and an exporter shipping on one tanker filled with $10 million worth of goods would pay as much as an exporter who shipped on 10 tankers each containing $1 million worth of goods.

[6] The export sales price is a function of export market conditions for the products being sold and the competitiveness of U.S. products in such markets.

to reduce the budgeted federal deficit.[7] Such a levy is not a "user fee" for services -- it is a tax on exports.[8]

However, while there is no conflict between the Export Clause and the Commerce Clause on the specific facts of this case, and while the opinions below in large part rested on distinguishing cases which have involved different, and more flexible constitutional limitations, in the final analysis one central point must govern: the Export Clause

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[7] *See* the findings of fact in the opinion of the three-judge panel below, *United States Shoe Corporation v. United States*, 907 F. Supp. 408, 412 (C.I.T. 1995), *citing*, *inter alia*, H.R. Rep. No. 251 pt. III, 99th Cong, 1st Sess. 19, reprinted in 1986 U.S.C.C.A.N. 6639.

[8] *Contrast New Orleans Steamship Ass'n v. Plaquemines Port, Harbor & Terminal Dist.*, 874 F.2d 1018 (5th Cir. 1989), *cert. denied*, 495 U.S. 932 (1990) (charges based on tonnage); *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707 (1972) and *Massachusetts v. United States*, 435 U.S. 444 (1978) (charges on a per use basis); *United States v. Sperry Corp.*, 493 U.S. 52 (1989) (no showing that arbitral fees keyed to claim dollars at issue did not approximate arbitral costs of resolving complex disputes; fees did not offend Just Compensation Clause); *Alamo Rent-a-Car, Inc. v. City of Palm Springs*, 955 F.2d 30, 31 (9th Cir. 1992) (airport concession fees which are a percentage of rental car company's income generated at that location and hence a direct function of use of that location do not discriminate against interstate commerce; no proof fees exceeded services airport provided); *cf. Moon v. Freeman*, 379 F.2d 382, 392 (9th Cir. 1967)(even an export certificate fee correlating to a per use basis would be a suspect exercise of the commerce power if substantial amounts of revenue were generated).

is an explicit limitation on sovereign power which must be recognized and given its full force and effect. The tax at issue here presents the easy case of a tax which falls within the central focus of that limitation and which accordingly cannot stand regardless of whatever justification the government may attempt to raise in its defense.

Amici respectfully submit this brief because we believe this simple principle lies at the heart of this case and requires affirmance of the decision below.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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January 13, 1998

ANNEX A

ANNEX A

LIST OF AMICUS PARTIES

A.T. Massey Coal Company, Inc., A&D Christopher Ranch, ABRO Industries, Inc., Adam Opel AG, Ahlstrom Pumps LLC, Air Liquide Process & Construction, Inc. and Bowen Tools, Inc., Alaskh Trading Corporation and Beef America Operating Company, Inc., Alfred C. Toepfer International, Inc., AlliedSignal Chemicals Inc., AlliedSignal Inc., AlliedSignal Laminate Systems, Inc., Alpha International, American Greetings Corporation, American Natural Soda Ash Corporation, American Standard Inc., Amtopp Corporation, Ansell Edmont Industrial, Inc., Aristech Chemical Corporation, Aristech Chemical International, Ltd., AVX Corporation, Barcroft Company/Rorer International Corporation, Betz International, Inc./Betz Europe, Inc., Borden Chemical, Inc., Borden Incorporated and ACME/Borden, Bowater Incorporated, Bridgestone/Firestone, Inc., Bristol-Myers Squibb Company, Bristol-Myers Barceloneta, Inc., Brown & Williamson Tobacco Corporation, By-Prod Corporation, Canada Trade Group Inc., Central Soya Company, Inc, Champion Export Corporation, Champion International Corporation, Chemlube International Inc., Chesebrough-Ponds USA Company, Cluett, Peabody & Company, Inc., Coastal Coal Sales, Inc., Coastal Eagle Point Oil Company, Coastal Mobile Refining Company, Coastal Refining & Marketing, Inc., Coastal States Energy Company, Coastal States Trading, Inc., Coffin Turbo Pump, Inc., Condea Vista Company f/k/a Vista Chemical Company, Conopco, Inc. d/b/a Calvin Klein Cosmetics Company, CPS Chemical Company, Inc., Day-Glo Color Corporation, Degussa Corporation, Demag Delaval Turbomachinery Corporation and Kinetics Technology International Corporation, Dorland Management, Inc., Duracell Inc., E.R. Squibb & Sons, Inc., Eastern Smelting & Refining Corporation, Elf Atochem North America, Inc., Eli Lilly & Company, Elizabeth Arden Company, Erexcorp Inc., FAI Trading Company, Federal Paper Board Company, Formosa America, Formosa Plastics Corporation, USA, Freudenberg Nonwovens

L.P., G.F. Vaughan Tobacco Company, Inc., Gates Rubber Company, General Motors Corporation, George E. Warren Corporation, Glen Raven Mills, Inc., Global Trading Resource Corporation, GOJO Industries, Inc., GSI Exim America, Inc., H.B. Fuller Company, Heinz Pet Products Company, Heinz U.S.A., Hendrickson Trailer Suspension Systems, a division of the Boler Company, Henkel Corporation, Hershey Foods Corporation, HKV, Holden's Motor Overseas Corporation Limited, Hughes Aircraft Company, Hughes Aircraft System International, Hughes Communication Galaxy, Inc., Hughes Electronics Corporation, Hughes Network Systems, Inc., Hughes Space and Communications International, Inc., Huls America, Inc., The Iams Company, Integrated Bagging, Inteplast Corporation, ISP Technologies, Inc., J.C. Penney Company, Inc., J.C. Penney Purchasing Corporation, Johnson Matthey Inc., K2 Corporation, Kenetech Windpower, Inc., Ketchikan Pulp Company, Louisiana Carbon Company, Louisiana Pacific Corporation, Lyondell-Citgo Refining Company, Ltd., Lyondell Petrochemical Company, Magma Copper Company, Magnavision, Inc., Magnavox Electronic Sys. Company, Mapco Alaska Petroleum Inc., Mapco Coal Inc., Matrix Essentials, Inc., M-C International, Miller Brewing Company, Morflex, Inc., Nan Ya Plastics Corporation, America, Nap-Key Stainless, Naporano Iron & Metal Company, National Dynamics Corporation, North American Chemical Company, North Safety Products, Ore-Ida Foods, Inc., Oxbow Carbon International, Inc., Oxbow Carbon & Minerals, Inc., Park Avenue Export Corporation, PCS Phosphate Company, Inc., Pfizer Corporation, Pfizer, Incorporated/Pfizer Pigments, Inc., Pfizer Overseas, Inc., Pharmacia and Upjohn Worldwide, Phillip Morris Products, Inc., Plough International, a division of Schering-Plough Healthcare products Inc. and Schering-Plough Products Inc., PMC Specialties Group, Inc., Producers Rice Mill, Inc., Quaker State Corporation, Reading & Bates Drilling Company, Reilly Industries, Inc., Rheinbraun Thyssen Energy, Inc., Samsung America, Inc., Saturn Corporation, Schlumberger Industries, Inc., Schlumberger Technology Corporation, Schweitzer-Mauduit International, Inc., Seibe North, Inc.,

Simsmetal America, Specialty Minerals Inc. and Barretts Minerals Inc., Specialty Oil Company, Inc., Squibb Manufacturing, Inc., Star Enterprise, Star-Kist Caribe, Inc., Star-Kist Seafood Company, Sumitomo Electric Lightwave Corporation, Sumitomo Electric USA, Inc., Sumitomo Electric Wiring Systems, Texaco, Inc., Texaco International, Trader, Inc., Texaco Refining & Marketing, Inc., TG (Texas Gulf) Soda Ash, Inc., TG (USA) Corporation, Thyssen Citgo Petcoke Corporation, Trane Export, Inc., Trane Company, Trane Co./Trane Export, Inc., Union Process, Inc., United Export Corporation/ABRO Industries, Inc., Universal Manufacturing Corporation, UOP, Vitol S.A., Inc., Vulcan Materials Company and Vulcan Gulf Coast Materials, Inc., Welch Foods Inc., a Cooperative, Westfalia Separator, Inc., Weyerhaeuser Company, Weyerhaeuser International Sales Corporation and Norpac Sales Corporation, World Pak, York International Corporation and Bristol Compressors Inc.

QUESTION PRESENTED

Whether application of the Harbor Maintenance Tax (26 U.S.C. §4461) to goods loaded for export at ports of the United States violates the Export Clause of the United States Constitution?

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In the Supreme Court of the United States

OCTOBER TERM, 1997

No. 97-372

UNITED STATES OF AMERICA, Petitioner,

v.

UNITED STATES SHOE CORPORATION, Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF *AMICI CURIAE* ALUMINUM COMPANY OF AMERICA, ALCOA INTERNATIONAL, S.A., ALCOA INTER-AMERICA, INC., ALCOA MEMORY PRODUCTS, INC., H-C INDUSTRIES, INC. AND THE STOLLE CORPORATION IN SUPPORT OF RESPONDENT

SUPPLEMENTAL STATEMENT OF STATUTORY PROVISIONS INVOLVED

The parties exclude several relevant sections of 26 U.S.C. §4462 from their statement of the constitutional and statutory provisions involved, including:

§ 4462. Definitions and special rules

* * *

(a)(4) **Commercial vessel.** -

(A) In general. - The term "commercial vessel" means any vessel used -

(i) in transporting cargo by water for compensation or hire, or

(ii) in transporting cargo by water in the business of the owner, lessee, or operator of the vessel.

* * *

(b) Special rules for Alaska, Hawaii, and possessions.-

(1) In general. - No tax shall be imposed under section 4461(a) with respect to -

(A) cargo loaded on a vessel in a port in the United States mainland for transportation to Alaska, Hawaii, or any possession of the United States for ultimate use or consumption in Alaska, Hawaii, or any possession of the United States,

(B) cargo loaded on a vessel in Alaska, Hawaii, or any possession of the United States for transportation to the United States mainland, Alaska, Hawaii, or such a possession for ultimate use or consumption in the United States mainland, Alaska, Hawaii, or such a possession,

(C) the unloading of cargo described in subparagraph (A) or (B) in Alaska, Hawaii, or any

possession of the United States, or in the United States mainland, respectively, or

(D) cargo loaded on a vessel in Alaska, Hawaii, or a possession of the United States and unloaded in the State or possession in which loaded, or passengers transported on United States flag vessels operating solely within the State waters of Alaska or Hawaii and adjacent international waters.

(2) Cargo does not include crude oil with respect to Alaska.- For purposes of this subsection, the term "cargo" does not include crude oil with respect to Alaska.

(3) United States mainland. - For purposes of this subsection, the term "United States mainland" means the continental United States (not including Alaska).

(c) Coordination of tax where transportation subject to tax imposed by section 4042. - No tax shall be imposed under this subchapter with respect to the loading or unloading of any cargo on or from a vessel if any fuel of such vessel has been (or will be) subject to the tax imposed by section 4042 (relating to tax on fuel used in commercial transportation on inland waterways).

(d) Nonapplicability of tax to certain cargo. -

(1) In general. - Subject to paragraph (2), the tax imposed by section 4461(a) shall not apply to bonded commercial cargo entering the United States for transportation and direct exportation to a foreign country.

(2) Imposition of charges. - Paragraph (1) shall not apply to any cargo exported to Canada or Mexico -

(A) during the period -

(i) after the date on which the Secretary determines that the Government of Canada or Mexico (as the case may be) has imposed a substantially equivalent tax, fee, or charge on commercial vessels or commercial cargo utilizing ports of such country, and

(ii) subject to subparagraph (B), before the date on which the Secretary determines that such tax, fee, charge has been discontinued by such country, and

(B) with respect to a particular United States port (or to any transaction or class of transactions at any such port) to the extent that the study made pursuant to section 1407(a) of the Water Resources Development Act of 1986 (or a review thereof pursuant to section 1407(b) of such Act) finds that -

(i) the imposition of the tax imposed by this subchapter at such port (or to any transaction or class of transactions at such port) is not likely to divert a significant amount of cargo from such port to a port in a county contiguous to the United States, or that any such diversion is not likely to result in significant economic loss to such port, or

(ii) the nonapplicability of such tax at such port (or to any transaction or class of transactions at such port) is likely to result in

significant economic loss to any other United States port.

(e) **Exemption for the United States.** - No tax shall be imposed under this subchapter on the United States or any agency or instrumentality thereof.

(f) Extension of provisions of law applicable to customs duty.-

(1) In general.-Except to the extent otherwise provided in regulations, all administrative and enforcement provisions of customs laws and regulations shall apply in respect of the tax imposed by this subchapter (and in respect of persons liable therefor) as if such tax were a customs duty. For purposes of the preceding sentence, any penalty expressed in terms of a relationship to the amount of the duty shall be treated as not less than the amount which bears a similar relationship to the value of the cargo.

* * *

(g) **Special rules.** - Except as provided by regulations -

* * *

(2) Exception for intraport movements.- Under regulations, no tax shall be imposed under section 4461(a) on the mere movement of cargo within a port.

(3) Relay cargo. - Only 1 tax shall be imposed under section 4461(a) on cargo (moving under a single bill of lading) which is unloaded from one vessel and loaded onto another vessel at any port

in the United States for relay to or from any port in Alaska, Hawaii, or any possession of the United States. For purposes of this paragraph, the term "cargo" does not include any item not treated as cargo under subsection (b)(2).

(h) **Exemption for humanitarian and development assistance cargos.** - No tax shall be imposed under this subchapter on any nonprofit organization or cooperative for cargo which is owned or financed by such nonprofit organization or cooperative and which is certified by the United States Customs Service as intended for use in humanitarian or development assistance overseas.

(i) **Regulations.** - The Secretary may prescribe such additional regulations as may be necessary to carry out the purposes of this subchapter including, but not limited to, regulations -

* * *

(3) exempting any transaction or class of transactions from such tax where the collection of such tax is not administratively practical, and

(4) providing for the remittance or mitigation of penalties and the settlement or compromise of claims.

INTEREST OF *AMICI CURIAE*

Amici curiae ("*Amici*") file this brief with the consent of all parties.[1] *Amici* seek to apprise the Court of interests other than those presented by the parties and to direct the Court's attention to the broader implications of the Court's ruling. For the period covering the fourth quarter of 1992 through and including the third quarter of 1996, *Amici* paid in excess of $2.5 million in harbor maintenance taxes ("HMT") on exports. *Amici* seek to recover these payments in several lawsuits filed in the Court of International Trade ("CIT"). These cases have been stayed pending resolution of this "test" case. *Amici,* along with several other companies, filed *amicus* briefs with the CIT and with the Court of Appeals for the Federal Circuit and participated in oral argument before the CIT in this case.

Because the HMT imposes a burden on exports, the imposition of the tax is a matter of serious concern to *Amici*. *Amici* and related entities are significant exporters of merchandise from the United States, having exported, primarily by sea, in excess of $1.2 billion worth of goods from the United States in 1996 and again in 1997. Because it is imposed on exporters, the HMT burdens *Amici's* exportation of goods by ship into the stream of international commerce and impairs the ability of *Amici* to transact business and compete in international markets.

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[1] Pursuant to Rule 37.6, *Amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than *Amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

Exports, and the access to ports that make exports possible, are matters of national interest. They not only benefit the ship owners and operators who transport merchandise to other countries and the companies that export merchandise overseas, but also a host of other parties, including manufacturers, sub-suppliers, dock and stevedoring providers, transporters who bring merchandise to ports, logistics and communications companies that arrange foreign shipments of merchandise and the cities and states throughout the country that derive benefits from the jobs and profits created by export transactions. It is no doubt in recognition of these benefits to the general welfare that for over two hundred years, the costs of port dredging were funded out of general tax revenues.

By placing the burden of funding a core governmental function such as port dredging on a limited class of indirect beneficiaries of such activity, as the HMT does, the Congress has unfairly and discriminatorily impeded the ability to export free of restrictive taxes and duties that the Export Clause was designed to prohibit. If this Court allows Congress to succeed in this approach under the guise of the faulty user fee rationale being argued by the United States, it will open the door to the wholesale shifting of funding of general welfare activities through unconstitutional taxation of a limited class of indirect beneficiaries -- a result squarely prohibited by the Export Clause.

Moreover, there is no broad user fee exception to the Export Clause. Even if there was, the HMT is not a valid user fee. It fails the user fee criteria developed by this Court in cases arising under Constitutional provisions which are less restrictive than the Export Clause by: (1) being

imposed in a discriminatory manner; (2) failing to offer benefits to taxpayers commensurate with the amount of tax paid; and (3) generating revenue far in excess of the cost of any conceivable harbor maintenance project. Indeed, the Government's own federal budget does not include the HMT in its listing of user fees.

ARGUMENT

I. The HMT is an Impermissible Tax

A. Background.

For almost two hundred years, the costs of developing, operating and maintaining the Nation's harbors and ports were paid from general tax revenues. S. Conf. Rep. No. 228, 99th Cong., 2d Sess. (1985), *reprinted in* 1986 U.S.C.C.A.N. 6705 at 6709. In 1986, Congress enacted the Water Resources Development Act, Pub. L. 96-662 (Nov. 17, 1986) (the "WDRA"), which included the HMT -- at the time, a 0.04% tax on merchandise loaded at any port. The rate was increased to 0.125% in 1991. 26 U.S.C. § 4461 *et seq*. The Senate Report described the HMT as "a new *tax* to cover a portion of Federal spending on harbor maintenance." S. Rep. No. 126, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644 (emphasis supplied).

Indeed, the HMT has all the hallmarks of a tax. It funds a core government function which confers benefits upon the public at large. It is imposed on exports on an *ad valorem* basis, 26 U.S.C. §4461(b), contains penalties for failure to pay, 19 C.F.R. §24.24(h) and 26 U.S.C. § 4462(f)(1), and serves a revenue raising purpose. The HMT is simply not a user fee.

B. The HMT Confers Benefits on the Public at Large Which Should be Funded from the General Revenue.

The HMT is imposed in order to fund port dredging, to ease vessel access into and out of United States ports. *See* S. Conf. Rept. No. 228, 99th Cong., 2nd Sess., *reprinted in* 1986 U.S.C.C.A.N. 6705, 6714 (additional views of S. Lautenberg). Yet, the HMT is not imposed on ship owners and operators, the direct beneficiaries of the port dredging activities, but rather on a limited class of indirect beneficiaries -- exporters. There are numerous other indirect beneficiaries of port dredging, including manufacturers, sub-suppliers, dock and stevedoring providers, transporters who bring merchandise to ports, logistics communications companies who arrange foreign shipments of merchandise and the cities and states throughout the country that derive benefit from the jobs and profits created by export transactions. Thus, port dredging generates substantially wider benefits than traditional user fee services which are more focused and narrow in benefit.[2]

Because port dredging provides general benefits and aids the general welfare, any funding for such activities must be tax based. *See United States v. City of Huntington*, 991 F.2d 71, 74 (4th Cir. 1993), *cert. denied*, 114 S.Ct. 1048 (1994) (rejecting argument that fees charged for core government functions, including fire and flood protection and street maintenance, constituted user fees in less stringent context of intergovernmental immunity from taxation). *See*

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[2] *See, e.g.*, Budget of the U.S. Gov't for FY 1998, Analytical Perspectives, ch. 4, User Fees and Other Collections at 61.

also Massachusetts v. United States, 435 U.S. 444, 448 n.3 (1977), *citing*, H.R. Rep. No. 91-601, 91st Cong., 1st Sess. at 3-4, 38 (1969) (noting that since the public at large benefits from the existence and operation of the military, the costs imposed on the national air system by the military should be paid from the general revenues).

Accordingly, the HMT is a tax and thus violative of the Constitution's Export Clause, Art. 1, sec. 9, cl. 5, which broadly prohibits the imposition of a tax or duty on articles exported from any state. If the Court reverses the courts below and sustains the HMT under the faulty "user fee" rationale advanced by petitioner, it will be a green light to Congress that general benefit public welfare activities can increasingly be funded by imposing the financial burdens on a limited class of indirect beneficiaries. As to exports, this result is flatly prohibited by the Export Clause.

C. The Nature and Operation of the HMT Indicate it is a Tax.

The HMT has all of the attributes of a revenue raising tax. The statute authorizing collection of the HMT, which is codified in the Internal Revenue Code, repeatedly calls the levy a tax. 26 U.S.C. §4461-62.

Failure to declare and pay the HMT can subject an exporter to penalties. *See* 19 C.F.R. 24.24(h); 26 U.S.C. §4462(f)(1). While taxes are subject to penalties for failure to pay, most user fees, on the other hand, do not result in such penalties, but rather an inability to use the service being provided by the Government. *United States v. City of Columbia*, 914 F.2d 151, 155-56 (8th Cir. 1990) (noting that

failure to pay tax results in civil or criminal penalties while failure to pay a user fee results in termination of services).[3]

Like a traditional revenue raising tax or duty, the HMT is imposed on an *ad valorem* basis.[4] Because of its *ad valorem* nature, there is little or no connection between benefits received by the taxpayer and the HMT paid. *See Massachusetts v. United States*, 435 U.S. 444, 445 (1977) (in imposing a tax to support the services the government provides to the public at large, a legislature need not consider the value of particular benefits to the taxpayer, but may assess the tax solely on the basis of the taxpayers' ability to pay).

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[3] Typical examples of user fees include the fees for admission to national parks, the sale of postage stamps and electricity and premiums for deposit insurance. Budget of the U.S. Gov't for FY 1998, Analytical Perspectives, ch. 4, User Fees and Other Collections at 61. Failure to pay a user fee such as the admission fee for a national park simply precludes the user from accessing the park - it does not subject the user to penalties like the HMT.

[4] The Government contends that by imposing the HMT on an *ad valorem* basis, Congress correlated the amount of the fee to the benefits received because shippers of higher value cargo receive greater benefits in the form of higher profits. Petitioner's Brief at 28. However, as recognized by the Court of Appeals, the profit margin on the sale on goods is in no way a function of the value of the goods; rather, it is a function of mark-up. *See United States Shoe Corp., v. United States*, 114 F.3d 1564, 1574 (Fed. Cir. 1997).

The HMT is also a tax because it serves a revenue raising purpose. *See, e.g., Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1399 (7th Cir. 1992) (a fee which generates revenues which are used to offset unrelated costs or confer unrelated benefits is a tax). The fact that the current balance of the Harbor Maintenance Trust Fund so greatly exceeds any actual, foreseeable or even conceivable amount necessary for harbor dredging shows that the HMT has a revenue raising purpose. *See Moon v. Freeman*, 379 F.2d 382, 392 (9th Cir. 1967) (accumulation of substantial amounts of revenue is indication that levy is impermissible burden on exports). The surplus in the Harbor Maintenance Trust Fund is in excess of $1.1 billion. Department of Treasury Unaudited, Final HMT Income Statement as of September 30, 1997, attached hereto at pages 23-24.

Despite this ever growing surplus, outlays from the Trust Fund are not slated to increase. Budget of the U.S. Gov't for FY 1998, Analytical Perspectives, ch. 16, Federal Programs by Agency and Account at 423. *See also, Third Annual Report to Congress on the Harbor Maintenance Trust Fund for FY 1994* ("3d Report") at 5, J.A. 91, __. Rather, the budget projects HMT outlays to remain approximately the same through FY 2002. *Id.* (projecting outlays as follows: FY 1997 - $519 million; FY 1998 - $490 million; FY 1999 - $468 million; FY2000 - $473 million; FY2001 - $482 million; FY 2002 - $484 million). Budget of the U.S. Gov't for FY 1998, Analytical Perspectives, ch. 16, Federal Programs by Agency and Account at 423.

The revenue raising purpose of the HMT is equally apparent through the manner in which the federal budget treats the Harbor Maintenance Trust Fund. The Trust Fund is an "on budget" fund; as such, its annual surpluses have been a credit to the federal budget deficit. Budget of the

United States Government for FY 1997, Analytical Perspectives, ch. 16, at 257 (noting that trust fund income exceeds outgo and that surpluses offset the need for the Government to borrow from the public to finance the Federal funds deficit). *See also* Budget of the U.S. Gov't for FY 1998, Analytical Perspectives, ch. 17, Trust Funds and Federal Funds at 294. From the onset, Congress was well aware of the effect the HMT would have on the federal deficit. "The increase in net budget receipts [from harbor maintenance taxes] will reduce the potential Federal budget deficit by a like amount..." *See* H.R. Rep. No. 251 pt. III, 99th Cong., 1st Sess. 19 (1985).

These factors point to the inescapable conclusion that the HMT is a tax. Because the Export Clause broadly prohibits the imposition of such a burden on goods in export transit, *see United States v. International Business Machines Corp.*, 517 U.S. 843, __, 116 S.Ct. 1793, 1797, 1803 (1996), the HMT is unconstitutional as it applies to exports.

III. Even Under the *Massachusetts* Test, the HMT Constitutes a Tax.

The Government contends there is a broad user fee exception to the Export Clause. The unqualified language of the Export Clause makes clear that all burdens on exports are prohibited, even if they are not for the purpose of raising revenue. *See IBM*, 517 U.S. 843, ___, 116 S.Ct. at 1802; *Fairbank v. United States*, 181 U.S. 283, 292-93 (1901).

When user fees have withstood scrutiny by the Court, the Constitutional provision in question was not the Export Clause. *See, e.g., Massachusetts v. United States*, 435 U.S. 444 (1977) (examining levy in the context of state tax immunity doctrine); *Evansville-Vanderbaugh Airport*

Authority Dist. v. Delta Airlines, 405 U.S. 707 (1972) (examining levy under implied constraints of commerce clause). The Court has developed a three-part test in the context of these other constitutional provisions to determine whether a levy constitutes a tax or a user fee. *Evansville*, 405 U.S. 707, 716-717; *Massachusetts*, 435 U.S. 444, 466-470. However, the test developed in these cases cannot just simply be applied to cases arising under the Export Clause, as there are meaningful textual differences between Export and other Constitutional clauses. *See IBM*, 517 U.S. 843, ___, 116 S.Ct. at 1795.

Assuming, *arguendo*, that the Court were to look to the *Massachusetts* and *Evansville* criteria for guidance, the HMT does not qualify as a valid user fee. Under the *Massachusetts* test, in order to constitute a user fee, a levy: (1) must not be discriminatory; (2) must be based on a fair approximation of use; and (3) must not be excessive in relation to the cost of the government benefit conferred. *Massachusetts*, 435 U.S. at 464. The HMT fails all three prongs of this test.

A. The HMT Is Discriminatory.

First, to qualify as a user fee, an assessment must not be imposed in a discriminatory manner. *See Massachusetts*, 435 U.S. at 460, 466-67 (a nondiscriminatory measure defrays the cost of a federal program by recovering a fair approximation of **each** beneficiary's share of the cost). The HMT is imposed in a discriminatory manner because it discriminates against exports and not all who benefit from harbor maintenance services pay the tax.

The HMT imposes an *ad valorem* tax on commercial goods in export transit, but is not imposed on goods shipped

to certain domestic ports or any ports of possessions of the United States. 26 U.S.C. §4462(a), (b). For example, the exporter of a shipment of goods in export transit bound from the Port of Los Angeles to Japan pays the HMT. However, there is no HMT liability for the exact same shipment of goods, in the very same vessel, making the exact same amount of use of the Port of Los Angeles, if the goods are bound for Hawaii, Alaska or any possession of the United States. 26 U.S.C. §4462(b).

The HMT also exempts from its application goods loaded on a vessel in certain domestic ports and ports of any U.S. possession for transportation to any U.S. state or possession (*i.e.*, from a port in Alaska or Hawaii to Los Angeles). 26 U.S.C. §4462(b). These and numerous other statutory exceptions establish that the HMT discriminates against exports[5] -- unlike the situation in *Massachusetts* and *Evansville* where the fees were nondiscriminatory. *See Massachusetts*, 435 U.S. at 467 (registration tax did not discriminate against state functions since it applied not only to private users of airways, but to civil aircraft operated by the United States); *Evansville*, 405 U.S. at 717 (use and service fee did not discriminate against interstate commerce where both interstate and intrastate flights were subject to same charge).

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[5] These exceptions also establish that the HMT impedes international commerce. The Export Clause "specifically prohibits Congress from regulating international commerce through export taxes." *See IBM*, 517 U.S. 843, ___, 116 S.Ct. at 1802. With respect to *Amici*, the HMT does just that. Because it is imposed on exporters, the HMT burdens *Amici*'s exportation of goods into the stream of international commerce.

In *Fairbank v. United States*, 181 U.S. 283 (1901), the Supreme Court struck down a ten cent tax on bills of lading which accompanied any exported goods. Bills of lading for domestic goods were only taxed at the rate of one cent. The Supreme Court observed "a discrimination is made between the tax upon an ordinary internal bill of lading and that upon one having respect solely to matters of export." *Fairbank*, 181 U.S. at 290. The HMT also makes an unconstitutional discrimination between port uses for goods in export transit and identical port uses for goods bound for domestic destinations.

Other exemptions also reveal that the HMT is discriminatorily imposed. While most goods in export transit are burdened by the HMT, port uses by the United States or any agency or instrumentality thereof are not. 26 U.S.C. §4462(e). Likewise, there is an exemption for crude oil with respect to Alaska, 26 U.S.C. § 4462(b)(2), for humanitarian and development assistance cargo, 26 U.S.C. § 4462(h), and for exports bound to Canada and Mexico under certain circumstances, 26 U.S.C. § 4462(d)(2). Recreational port users also benefit and pay no tax, nor do importers of merchandise entering the United States under bond for exportation to a foreign country. 26 U.S.C. § 4462(d)(i).

Moreover, appropriations from the Harbor Maintenance Trust Fund are permitted for any eligible "commercial navigation" projects by the Army Corps of Engineers. 33 U.S.C. § 2238. According to the 3d Report, "[m]any projects with 'commercial navigation' as a project purpose have other authorized purposes as well. Such purposes include recreation, hydropower, flood control, water supply and the like." 3d Report at 2, J.A. 91, __. The National Oceanic and Atmospheric Administration is

also allocated $45.5 million for projects with a variety of purposes, including the creation of navigation charts, marine weather forecasting and similar services. 3d Report at 1, J.A. 91, __.

Consequently, the HMT is discriminatorily imposed, particularly against exports. On this basis alone, the HMT fails the *Massachusetts* test and amounts to an unconstitutional tax on exports.

B. There is No Relationship Between the Charge and the Benefits Conferred.

In examining a levy in the context of other Constitutional clauses, this Court has held that while a user fee need not be "precisely calibrated" to match the benefit conferred, a "user fee [must] be a 'fair approximation of the cost of the benefits supplied.'" *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989), *quoting Massachusetts v. United States*, 435 U.S. at 463 n.19. Since this case arises in the context of the Export Clause, if a user fee type analysis is adopted, the Court should, at least, require HMT charges to be "closely calibrated" to match the value of port use. They are not.

It is impossible to conclude that the HMT bears a direct relationship, much less a reasonable or fair one to the benefits exporters derive from port use. First, the amount of the tax is, in most cases, irreconcilable with any benefit received from the port use because the tax is calculated on an *ad valorem* basis. 26 U.S.C. §4461(b). A vessel requiring little underwater clearance with a cargo of precious diamonds receives no benefit from harbor dredging, yet it bears a disproportionately high share of HMT. On the other hand, deep draft vessels carrying low value, bulk cargo

benefit from harbor dredging and the resulting deeper harbors to a far greater extent. Yet, the cost to the high value shipper is greater. The HMT does not identify specific, relevant factors (such as amount of time spent in the harbor, depth of draft of the vessel, depth of the harbor) for setting fees.

While some *ad valorem* user fees have been upheld in the face of constitutional challenges, *see, e.g., Alamo Rent-A-Car v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), *United States v. Sperry Corp.*, 493 U.S. 52 (1989), those cases did not involve constitutional challenges under the absolute prohibition against burdens on exports contained in the Export Clause. In *Sperry*, the *ad valorem* fee at issue was challenged under the Just Compensation Clause. 493 U.S. at 61. Moreover, the fee at issue was assessed against the direct beneficiary of the process. In this case, the direct beneficiaries, deep draft vessel owners and operators, do not pay -- those who export goods into the stream of international commerce do. *See also Alamo*, 906 F.2d at 520 (where fee was imposed on the direct beneficiary of the use of the airport and the challenge was under the Commerce Clause).

Second, many who clearly benefit from the HMT pay no tax at all. A vessel requiring deep draft clearance entering a port for repairs, crew change, re-fueling, or to avoid a storm, may derive benefits from port use, yet by refraining from loading or unloading, it pays no tax at all. The same is true for military and other exempted vessels. *See* 26 U.S.C. §4462. Additionally, a cargo vessel that unloads and departs from a port pays no export HMT notwithstanding its burden on port resources. 26 U.S.C. §4462.

The HMT most directly benefits vessel owners and operators, yet they have no HMT liability. S. Rep. No. 126, 99th Cong., 2d Sess. 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6647 ("The tax in title 8 is not on the harbor, nor is it on the vessel's operator or owner."). In fact, in its report on the Water Resources Development Act of 1986, Pub. L. No. 99-662 (Nov. 17, 1986), the Senate Committee on Environment and Public Works noted: "[t]hese fees and taxes offset services rendered to vessels." S. Rep. No. 126, 99th Cong., 2d Sess. 7 (1986), *reprinted in* 1986 U.S.C.C.A.N. 6639, 6644.

Third, there is also no correlation between the amount of money spent on a port's maintenance and the amount of revenue collected from that particular port. The majority of HMT revenues are paid by exporters in major U.S. ports, yet monies dispersed from the Harbor Maintenance Trust Fund benefit other ports more.[6] Indeed, the United States conceded that "[t]here is no relationship between the amount of money spent on a port's maintenance and the amount of revenue collected from cargo moving in or out of that particular port." *Corps of Engineers Briefing Book and Fact Sheets on the HMT and Fund* at 1 (Feb. 14, 1990), J.A. 75, __.

Because the HMT fails to offer benefits to taxpayers correlative with the amount of tax they pay, the HMT fails

---

[6] *See, e.g., Army Corps of Engineers Estimated Receipts of Harbor Maintenance Fee from Cargo Transporting Major Ports* (1992)(draft), J.A. 85, __, (noting that, of $78,711,000 estimated 1992 taxes on exports and imports from the Port of Los Angeles, only $162,000 was returned in port operation expenditures).

the second prong of the *Massachusetts* test. On this basis alone, the HMT constitutes an unconstitutional tax.

C. HMT Revenues Exceed Costs.

The HMT fails the third prong of the *Massachusetts* test because it generates revenues that greatly exceed the cost to the Government of port dredging. As noted above, the surplus in the Harbor Maintenance Trust Fund is currently in excess of $1.1 billion. Department of Treasury Unaudited, Final HMT Income Statement as of Sept. 30, 1997, attached hereto at page 23-24. There is no reasonable expectation that these moneys in the Trust Fund will be spent at any time in the foreseeable future for harbor maintenance and operation - especially since HMT revenues continue to grow while projected expenditures are flat. *See* Budget of the U.S. Gov't for FY 1998, Analytical Perspectives, Ch. 16, Federal Programs by Agency and Account at 423.

Because a user fee must be no greater than the Government's cost, *National R. Passenger Corp. v. City of New York*, 695 F.Supp. 1570, 1575 (S.D.N.Y. 1988), *aff'd*, 882 F.2d 710 (2d Cir. 1989), and because the surplus accumulating in the HMF indicates that HMT collections vastly exceed the cost of any foreseeable harbor operations and maintenance, the HMT fails the third prong of the *Massachusetts* test and, on this basis alone, constitutes an impermissible tax.

IV. The Federal Budget's Own Treatment of the HMT Shows it is not a User Fee

Indeed, and perhaps most importantly in light of the Government's arguments here, the federal budget does not even treat the HMT as a user fee. *See* Budget of the U.S. for FY 1998, Analytical Perspectives, User Fees and Other Collections, ch. 4 at 61-66. The Federal Government characterizes user fee income as "income from its various business-type activities." *Id.* at 61. The Government's listing of user fee income includes such items as the sale of postage stamps and electricity, premiums for deposit insurance and rents and royalties for the right to extract oil from the Outer Continental Shelf, **but not the HMT**. *Id.* at 61. Unlike these business-type activities in which the Government engages -- in competition with private providers -- maintaining the Nation's harbors is a core government function. Consequently, under the Government's own definition, the HMT fails to qualify as a user fee.

CONCLUSION

Because the harbor maintenance tax is an unconstitutional burden on exports, the decision of the Court of Appeals for the Federal Circuit, *United States Shoe v. United States*, 114 F.3d 1564 (1996), should be affirmed.

Respectfully submitted,

Melvin S. Schwechter
John C. Cleary
Julie A. Coletti

January 15, 1998

UNAUDITED
FINAL

Harbor Maintenance
Trust Fund
20X8863
Income Statement
For the Period 10/01/96 Through 09/30/97

	Current Month	Year-To-Date
RECEIPTS		
Revenue		
Tax on Imports	$ 38,612,472.63	$ 434,037,127.71
Tax on Exports	28,883,830.09	214,017,353.39
Tax on Domestics	5,401,086.74	34,819,510.09
Tax on Passengers	861,281.28	3,987,639.80
Tax on Foreign Trade	6,644,317.33	48,975,998.88
Total Revenue	$ 72,802,948.29	$ 735,533,629.87
Investment Income		
Interest on Investments	$ 480,829.27	$ 53,632,410.87
Accrued Interest Income	4,811,201.07	1,503,578.32
Total Investment Income	$ 5,292,030.34	$ 55,135,989.19
Total Other Income	$ 78,094,978.63	$ 790,669,619.06
Net Receipts	$ 78,094,978.63	$ 790,669,619.06
OUTLAYS		
Operating Exp - Misc. Returns	$ 0.00	$ (26.25)
NONEXPENDITURE TRANSFERS		
Transfer to SLSDC	$ (1,422,296.00)	$ (10,322,396.00)
Transfer to Corps of Engineers	(74,130,021.65)	(535,986,960.00)
Transfer to Transportation	0.00	(193,000.00)
Transfer to Customs	0.00	(3,000,000.00)
Total Outlays/Transfers	$ 75,552,317.65	$ 549,502,229.75
NET INCREASE/(DECREASE)	$ 2,542,660.98	$ 241,167,389.31

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UNAUDITED
FINAL

Harbor Maintenance
Trust Fund
20X8863
Balance Sheet
As of 09/30/97

ASSETS		
Undisbursed Balances:		
Funds Available for Investment	3,713.33	
Total Undisbursed Balance		$ 3,713.33
Receivables:		
Investments :		
MX Bill Mat 9/30/98	$ 1,167,290,000.00	
Unamortized Discount	(55,051,226.56)	
Net Investments		$ 1,112,238,773.44
TOTAL ASSETS		$ 1,112,241,486.76
LIABILITIES & EQUITY		
Liabilities:		
Equity:		
Beginning Balance	$ 871,074,097.45	
Net Change	241,167,389.31	
Total Equity		$ 1,112,241,486.76
TOTAL LIABILITY/EQUITY		$ 1,112,241,486.76

Bureau of Public Debt
Office of Public Debt Accounting
Government Securities Management Branch
Trust Funds Team
Date:

OCT 23 1997

No. 97-372

Supreme Court, U.S.
FILED
JAN 15 1998
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

—v.—

UNITED STATES SHOE CORPORATION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR *AMICI CURIAE* TOTES-ISOTONER CORPORATION, ET AL. (SUCCESSOR TO ARIS-ISOTONER, INC.), IN SUPPORT OF RESPONDENT

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BEST AVAILABLE COPY

STATEMENT OF INTEREST OF *AMICI CURIAE*

Amici curiae are companies which export merchandise through the ports of the United States, and have paid the Harbor Maintenance Tax that is in issue in this case, 26 U.S.C. § 4461. *Amici* have appeared in this capacity before the courts below.

The following companies are represented as *amici curiae*: Totes-Isotoner Corporation (successor to Aris-Isotoner, Inc.); Berwick Industries, Inc.; Chevron Chemical Company, Inc.; Chevron Chemical International Sales, Inc.; Chevron International Oil Company; Chevron Overseas Petroleum, Inc.; Chevron U.S.A., Inc.; Fieldston Clothes, Inc.; General Glass International Corporation; Microsoft Corporation; The Pillsbury Company; Rhone-Poulenc, Inc.; Uniroyal Chemical Company, Inc.; Xerox Corporation; Xerox Corporation, Americas Operations Division; Xerox Corporation, Southern California Manufacturing Operations Division; and Xerox International Partners.

The parties to this action have consented to the filing of this brief by *amici curiae*, in support of the respondent.

QUESTION PRESENTED

Whether the Harbor Maintenance Tax (26 U.S.C. § 4461(a)), by imposing an *ad valorem* tax on articles loaded at ports of the United States for exportation, violates the Export Clause of the United States Constitution.

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No. 97-372

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES SHOE CORPORATION.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF FOR AMICI CURIAE
TOTES-ISOTONER CORPORATION, et al. (successor to Aris-Isotoner, Inc.), IN SUPPORT OF RESPONDENT

OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-45a) is reported at 114 F.3d 1564. The decision of the United States Court of International Trade (Pet. App. 46a-89a) is reported at 907 F. Supp. 408.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1997. The petition for a writ of certiorari was filed on August 29, 1997, and was granted on October 31, 1997 (118 S. Ct. 361). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The constitutional and statutory provisions set forth in the brief of the parties are hereby adopted by *amici curiae*.

STATEMENT

Amici curiae Totes-Isotoner Corporation, et al. respectfully file this brief[1] on consent of all parties in support of respondent United States Shoe Corporation, urging affirmance of the decision below.

Amici curiae hereby concur with the Statement set forth in the Respondent's brief.

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[1] Pursuant to Rule 37.6 of the Rules of this Court, *amici curiae* hereby represent that this brief was authored by counsel for *amici curiae*, and was not, in whole or in part, authored by counsel for any party to this action. No person or entity, other than *amici curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The appellate court properly concluded that the Harbor Maintenance Tax (HMT), 26 U.S.C. § 4461, violates the Export Clause of the United States Constitution because it is an *ad valorem* tax on articles exported from the United States.

a. The Export Clause expressly and absolutely forbids the laying of taxes or duties "on Articles exported from any State".

b. The HMT is a constitutionally prohibited "tax" or "duty" within the common meaning of those terms. It is a revenue-raising measure which *de jure* burdens articles in export transit. The HMT is directly tied to the act of exportation and is assessed directly on the article exported.

Because the Export Clause imposes an absolute prohibition on Congress' power to burden exported articles, the stated Congressional purpose of any tax, duty, or other fee laid on exported articles is irrelevant to the question of whether the HMT is a prohibited "tax" or "duty" in the first instance. Congress may not avoid a constitutional restriction on its power through legislative declaration. Therefore, Congress' denomination of the HMT as a "port use" charge does not erase or justify the export-burdening effect of the tax. A statutory provision defining the exportation of a class of articles as "port use" may not be used to obscure the fact that the HMT directly burdens articles in the course of their exportation by assessing a value-based tax on the exported article itself.

c. Because the HMT directly burdens exported articles within the meaning of the Export Clause, it cannot be construed as a valid "user fee" imposed under Congress' Commerce Clause powers. The Export Clause's specific and express prohibition on Congressional taxation of exported articles may not be qualified by the regulatory powers granted Congress under the Commerce Clause. Therefore, even assuming *arguendo* that the HMT is non-discriminatory, is based on some fair approximation of use, and is not excessive with regard to any benefit conferred, it nevertheless constitutes an unconstitutional tax on exports.

d. The HMT does not meet the criteria for a user fee under the test enunciated in *Massachusetts v. United States*, 435 U.S. 444 (1978), as it is not based upon a fair approximation of use and is excessive with respect to any benefit conferred.

ARGUMENT

THE HARBOR MAINTENANCE TAX VIOLATES THE EXPORT CLAUSE OF THE CONSTITUTION

A. The Export Clause Imposes an Absolute Prohibition on Taxes or Duties Laid on "Articles Exported"

The Export Clause expressly and absolutely forbids the laying of taxes (or duties) "on Articles exported from any State". In *Pace v. Burgess*, 92 U.S. 372 (1875), this Court held that:

> the constitutional provision that "no tax or duty shall be laid to articles exported from any State" *absolutely*

> prohibits Congress from imposing a pecuniary charge on them, whether it consists of a tax or a duty . . . even if it has been asserted that these charges are only for the regulation of trade, and are not a tax or duty for the purpose of revenue.

(*emphasis added*). Further evidence that the Export Clause denies Congress the power to burden exported articles through taxes, duties, or assessments of any kind is revealed by examining the historical context in which the Clause was drafted.

The Export Clause was "one of the compromises which entered into and made possible the adoption of the Constitution." *Fairbank v. United States*, 181 U.S. 283, 290 (1901). Its supporters were concerned that, absent a ban on export taxation, exporting States would tax the produce of neighboring States. *See* 2 M. Farrand, *Records of the Federal Convention* (rev. ed. 1966) (Mr. Williamson, speaking of Virginia's taxes on exports of North Carolina's tobacco: "Should it take place, it would destroy the last hope of adoption of the plan") *Id.* at 360; (Mr. Butler was "strenuously opposed to a power over exports: as unjust and alarming to the staple States"). *Id.*

The Framers were equally concerned that the national government be denied the power to tax exports. *See* M. Farrand, *Records of the Federal Convention*, *supra*, at 307 ("Mr. Gerry thought the legislature could not be trusted with such a power. It might ruin the Country. It might be exercised partially raising one and depressing another part of it"); (Mr. Sherman: "The complexity of the business in America would render an equal tax on exports impracticable", and "A power to tax exports would

shipwreck the whole".); *Id.* at 360 (Mr. Elseworth: "The produce of different states is such as to prevent uniformity in such taxes. there are indeed but a few articles as could be taxed at all; as Tobo. Rice & indigo, and a tax on these alone would engender incurable jealousies."); *Id.* at 361 (Mr. Sherman: "It is best to prohibit the National legislature in all cases".).

While some delegates to the Federal Convention believed taxation of exports to be an appropriate and in some cases essential governmental power[2], the Export Clause which emerged was a broad and absolute prohibition on export taxation.[3] Thus, as this Court

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[2] *See* 2 M. Farrand, *Records of the Federal Convention*, *supra*, at 307, 360 (Mr. Govr. Morris "considered the taxing of exports to be in many cases highly politic" (p. 307)), and expressed concern that "If no duty can be laid on exports, an embargo cannot be laid, though in time of war such measure may be of critical importance" (p. 360)).

[3] As the completion of the Convention's work neared, a late effort to permit export taxes in certain circumstances was defeated:

> The influence of the southern members in the work on the committee of detail has already been referred to in the provision[], that there should be no tax on exports . . . .

(continued...)

recently noted, there is "substantial evidence from the Debates that proponents of the [Export] Clause fully intended the breadth of scope that is evident in the language". *United States v. International Business Machines Corp.*, 116 S. Ct. 1793, 1803, 135 L. Ed. 124 (1996) *("IBM")*.

Given the history of the Export Clause, this Court has taken pains to ensure that the broad prohibition of the Clause -- part of the cement binding our nation together -- is strictly protected from encroachments.

Thus, in *United States v. Hvoslef*, 237 U.S. 1 (1915), the Court noted that the Export Clause:

> . . . is a restriction on the power of Congress; and as in accordance with the rules heretofore noticed the grants of power should be construed as to give full efficacy to those powers and enable Congress to use such means

---

[3](...continued)
When these questions came before the convention, the prohibition on export taxes was objected to, but more strenuously by the middle states than by New England. Madison suggested as a betterment of the situation that export taxes might be laid by a two-thirds vote. The proposal was lost and Massachusetts then supported the provision of the printed draft. The prohibition on export taxes was accordingly adopted and by a vote of seven to four.

M. Farrand, *The Framing of the Constitution of the United States*, at 148 (1913).

as it deems necessary to carry them into effect, so in like manner a restriction should be enforced in accordance with its letter and spirit and no legislation can be tolerated which, although it may not conflict with the letter, destroys that spirit and purpose of the restriction imposed. . . . "If mere discrimination between the States was all that was contemplated it would seem to follow that an *ad valorem* tax upon all exports would not be obnoxious to this constitutional prohibition. But surely under this limitation Congress can impose an export tax neither on one article [of] export, nor on all articles of export. In other words, *the purpose of the restriction is that exportation, all exportation, shall be free from national burden.*"

237 U.S. at 15 *(citing Fairbank*, 181 U.S. at 290) (*emphasis added).*

Recently, in *IBM*, this Court reaffirmed its consistent view that the Export Clause strictly prohibits *any* tax or duty falling on articles in the course of exportation. 116 S. Ct. at 1797. *IBM* confirmed that even taxes which *indirectly* fall on goods being exported are prohibited where they are in "in effect" or "in substance" a tax on exports because of their close relation or connection to the articles exported. *Id.* at 1804. *See Hvoslef*, 237 U.S. at 16 (taxes on ship charters); *Thames & Mersey Marine Ins. Co. v. United States*, 237 U.S. 19 (1915) (taxes on marine insurance). Such indirect impositions violate the Export Clause because they *burden* exportation in the same way as taxes which are laid directly on the goods themselves. *IBM*, 116 S. Ct. at 1797 (*citing Hvoslef*, 237 U.S. at 27); *Brown v. Maryland*, 25 U.S. (Wheat.) 419, 445 (1827).

In contrast to the Import-Export Clause [U.S. Const., art. I, Section 10, cl. 2] (prohibiting States from imposing "Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing its Inspection Laws"), the Export Clause broadly prohibits all "taxes" or "duties" on exports. *IBM*, 116 S. Ct. at 1801-02; *See Michelin Tire Corp. v. Wages*, 423 U.S. 276, 290-93 (1976). The term "tax" as it appears in the text of the Export Clause is broad and unambiguous, making no allowance for non-discriminatory taxes or "user fees". In this regard, "the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all." *IBM*, 116 S. Ct. at 1803.

B. The HMT is a "Tax" Which is Imposed on, and Burdens, Articles in Exportation

The HMT is a revenue-raising measure which *de jure* burdens articles in the course of exportation. Because it is directly related to the export process and burdens exported articles by adding to the cost of their exportation, the HMT is unconstitutional under the Export Clause.

In *IBM,* this Court examined the meaning of the term "Articles exported", as used in the Export Clause. Citing *Pace v. Burgess* and other decisions,[4] the Court

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[4] *Turpin v. Burgess*, 117 U.S. 504 (1886) (federal excise tax on tobacco products); *Cornell v. Coyne*, 192 U.S. 418 (1904) (federal excise tax on filled cheese manufactured under contract for export).

acknowledged that the Export Clause does not insulate from taxation all goods which might eventually be exported. 116 S. Ct. at 1796-97.[5] Certain "nondiscriminatory *pre-exportation* assessments do not violate the Export Clause, even if the goods are eventually exported." *Id.* (*emphasis added*). However, such goods simply are not within the scope of the Export Clause because they are not "Articles exported".

On the other hand, this Court has never wavered from, and recently affirmed, the bedrock principle that "taxes levied on goods in the course of exportation and taxes directed *specifically* at exports" violate the Export Clause. *IBM*, 116 S. Ct. at 1797 (*citing Turpin v. Burgess*, 117 U.S. 504, 507 (1886) (*emphasis added*). The HMT violates the Export Clause on both counts. Moreover, "the Export Clause has been construed to strictly prohibit any tax or duty, discriminatory or not, that falls on exports during the course of exportation." *IBM*, 116 S. Ct. at 1797. The prohibition also extends to certain services and activities that are "closely related" to the export process. *IBM*, 116 S. Ct. at 1798.

Articles held to be "in the course of exportation" include those which have been delivered to the exporting

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[5] For example, a non-discriminatory tax laid on the net income of a company engaged in the export business has been found not to violate the Export Clause because the articles taxed were neither "in the course of exportation" nor were they inherently or commercially export-related. *William E. Peck & Co. v. Lowe*, 247 U.S. 165, 174 (1918).

carrier. In *A.G. Spalding & Bros. v. United States*, 262 U.S. 66, 70 (1923), the taxation of certain baseball equipment, to which title was transferred upon delivery to the export carrier, was found to violate the Export Clause. In short, once goods have moved from the manufacturing or inventory stage, and have entered the stream of export commerce, they cease to be "pre-export" articles and may not be taxed.

The HMT is levied on articles in the course of their exportation, according to the articles' value. It follows inexorably that the HMT is directed *specifically* at exported articles after they have entered the stream of export commerce, and hence violates the Export Clause.[6]

The statute imposes the HMT, "in the case of commercial cargo *to be exported* from the United States by water, at the time of loading"[7] on the exporting carrier. Congress has therefore targeted for *ad valorem* taxation articles "to be exported". The "taxable event", within the meaning of *Spalding* and *IBM*, is the loading of goods

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[6] It is particularly telling that, under Customs' implementing regulations [19 C.F.R. § 24.24(e)(2)(i)], the person liable for the payment of the export HMT is the person listed on the Shipper's Export Declaration or equivalent document as exporter. The nature and terms of any underlying commercial transaction which causes the exportation (i.e., sale, consignment) are irrelevant. All that matters is that "commercial cargo" is exported, and that the "exporter" thereby incurs liability for the HMT.

[7] 26 U.S.C. § 4461(c)(2)(A).

which are, according to Congress' own definition, in the process of exportation.

Congress' denomination of the HMT as a tax on "port use" does not obviate, much less justify, the export-burdening effect of tax. The Export Clause's absolute prohibition on Congressional taxation of exported articles renders irrelevant the stated purpose of any tax, duty, or other fee laid on exported articles. Congress may not avoid a constitutional restriction on its power through legislative declaration. *Fairbank v. United States*, 181 U.S. 283, 301 (1901) (discussing *Monongehela Navigation Co. v. United States*, 148 U.S. 312 (1893))[8]. Congress should not be permitted, by using the phrase "port use" to describe the exportation of a class of articles, to obscure the fact that the HMT directly burdens those articles in the course of their exportation, in violation of the Export Clause.

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[8] In this connection, it is significant that the HMT Act excludes from its definition of "port use" numerous activities which clearly constitute the use of port facilities in common meaning. The tax-exempted activities include lading of bunker fuels, ship's stores, sea stores or vessel equipment [26 U.S.C. § 4462(a)(3)(B)(i)], the landing of fish and aquatic animal life [*Id.*, § 4462(a)(3)(B)(ii)], the transport of cargoes by non-commercial vessels [*Id.*, § 4462(a)(4)(A)], ferry transportation [*Id.* § 4462(a)(4)(B)], and recreational port use. Indeed, in the absence of "commercial cargo", no tax is ever assessed. This illustrates that the HMT is nothing more than a tax which falls on a class of exported merchandise, to wit, "commercial cargo". *Id.*, § 4462(a)(3)(A).

This Court noted in *IBM* that it had never "carefully defined how [it] decides a particular federal tax is sufficiently related *to the goods or their value* to violate the Export Clause." 116 S. Ct. at 1801 n. 3 (*emphasis added*). This Court need not decide that question here, however, as the HMT by its terms, is triggered by the very act of loading cargo *for exportation* and assessed directly on the *value* of the export cargo, *irrespective of the level of port use*.[9] Therefore, Congress' denomination of the HMT as a tax on "port use" is completely irrelevant to question of whether it burdens articles in the course of their exportation.

Finally, no case cited by petitioner supports its proposition that *any* federal tax, charge or assessment *on the exported article itself* is permissible under the Export Clause. The cases cited by appellant addressed charges or assessments on the use of commercial facilities, as in *Massachusetts v. United States, supra* (tax on use of federal aviation facilities only), rather than a tax on "Articles

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[9] Even assuming *arguendo* that the HMT's *ad valorem* assessment scheme is in some way related to "port use", it is no less a tax on "articles exported". Moreover, this case does not implicate the concerns, voiced by the dissenting Justices in *IBM*, that the term "Articles exported" not be defined in an overbroad or vague manner, and thereby complicate a taxing agency's task of determining when an article has entered the stream of exportation, and whether the tax "burdens the exporting process". 116 S. Ct. at 1808 (Kennedy, J., dissenting). The HMT by *definition* applies to articles in the stream of exportation and burdens exports by taxing them directly.

exported". *See also Evansville-Vanderburgh Airport Authority District v. Delta Airlines*, 405 U.S. 707 (1972) (fee on use of airport facilities); *Alamo Rent-A-Car, Inc. v. Sarasota-Manatee Airport Auth.*, 906 F.2d 516 (11th Cir. 1990), *cert. denied*, 498 U.S. 1120 (1991) (fee on use of airport by car rental agencies). The absence of any tax on exported articles in those cases undermines their precedential value here.[10]

Furthermore, where a tax or charge is not assessed on an "article exported", it proves nothing that certain courts have failed to condemn the *ad valorem* nature of the assessment[11]. If the tax or assessment is not imposed on the "article exported" (or is not closely related to the exportation process), then the Export Clause is not implicated, and the *method* of calculating the tax is irrelevant for purposes of this case.

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[10] To the extent the Court of Appeals determined that the HMT is tax on exports *because* it does not satisfy the criteria for a valid user fee set forth in *Massachusetts v. United States, supra*, its reasoning was faulty. The requirements for Export Clause protection are mutually exclusive from the *Massachusetts* user fee criteria. For instance, a non-discriminatory, indirect tax which burdens articles in the course of exportation cannot be a valid user fee, even if the user fee criteria are satisfied.

[11] *See, e.g., United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989). The *Sperry* case arose under the Constitution's Just Compensation Clause, not the Export Clause.

C. Congress' Regulatory Powers under the Commerce Clause do not Trump the Express Prohibitions of the Export Clause

The Export Clause expressly and unconditionally denies Congress the power to tax "Articles exported". Congress may not arrogate to itself the prohibited power by invoking its Commerce Clause power to regulate interstate and foreign commerce. *See IBM*, 116 S. Ct. at 1798-99.

Congress has power, under the Commerce Clause, to enact laws with the purpose of fostering and regulating interstate commerce. To this end, Congress may impose fees to recoup the cost of regulatory programs or to discourage certain activities. The Commerce Clause powers are subordinate to limitations contained in other parts of the Constitution. As noted in *North American Co. v. SEC*, 327 U.S. 686, 704 (1946) (*citation omitted*):

> For nearly one hundred and twenty-five years, this Court has recognized that the power of Congress over interstate commerce "is the power to regulate. . . ." This is not to say, of course, that Congress is an absolute sovereign. It is limited by express provisions in other parts of the Constitution, such as Section 9 of Article I . . . .

The Commerce Clause cannot create an *exception* to the Export Clause's absolute prohibition, irrespective of purpose. A charge or fee may be acceptable under the Commerce Clause, *but only if* it does not fall on exported articles. For example, in *Armour Packing Co. v. United States*, 209 U.S. 56 (1908), this Court upheld as a valid

exercise of the Commerce Clause a law requiring that common carriers charge all shippers, including export shippers, a uniform published rate. The law had a valid regulatory purpose (requiring that all shippers be treated alike). The Export Clause was not implicated because the law imposed a criminal penalty rather than a tax or duty. Nothing in the Court's decision suggests that the Commerce Clause limited the Export Clause prohibition in the name of federal regulation. *Armour Packing*, 209 U.S. at 79. Moreover, there was no federal assessment or charge placed *on the article exported* in that case. *See also Moon v. Freeman*, 379 F.2d 382 (9th Cir. 1967) (export certificate program regulating wheat prices did not implicate the Export Clause because there was no tax on articles in the course of exportation).

Finally, it is noteworthy that the framers of the Constitution, after adopting the Export Clause, amended the Import-Export Clause to permit the States to impose fees on exports for limited regulatory purposes. That such a power of taxation for the purpose of defraying regulatory costs was denied to the Federal government underscores the framers' intent to prohibit the Federal taxation of exports in all cases, regardless of regulatory purpose.[12]

D. The HMT Does Not Meet the Criteria for a User Fee Set Out in *Massachusetts* and *Evansville-Vanderburgh*

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[12] In any event, as the Court of International Trade aptly noted below, the export HMT has no regulatory purpose; it "neither seeks to regulate commerce nor repay the costs of services rendered". Pet. App. 60a.

Even assuming, *arguendo*, that the export HMT could be characterized as a "user fee", it would still not meet the criteria required of a valid fee under the test enunciated in *Massachusetts v. United States*, 435 U.S. 444 (1978), and *Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), as it is not based upon a fair approximation of use and is excessive with respect to any benefit conferred.

A user fee need not be "precisely calibrated" to the extent of a party's private use of government-provided facilities, but need only be based on a "fair approximation" of use. *United States v. Sperry Corp.*, 493 U.S. 52 (1989). That the HMT is based on the value of exported articles, rather than on some approximation of port use, is manifest from the fact that the statute exempts from taxation numerous activities, both commercial (e.g., bunkering, ship fitting, fishing) and noncommercial (recreation), which in common understanding clearly involve the use of port and harbor facilities.

Further, the HMT is not calibrated with respect to the government's costs of providing harbor services to exporters. As the Federal Circuit aptly noted (Pet. App. at 21a-22a), the "*Massachusetts* case itself suggests that the cost of the benefits, rather than the value is the appropriate measure . . . ." However, even within the limited range of "commercial cargo" subject to taxation, the HMT is assessed without regard to the degree of port use. A large cargo of relatively inexpensive bulk ores, requiring a large ship and a deep draft port, will be assessed with less tax than a small cargo of more valuable precious metals or jewels, which make minimal use of port facilities. The HMT statute makes no distinction between

the two cargoes based on any rational measure of "port use", such as weight, volume, ship draft, displacement or types of port facilities used in the loading or unloading process; it falls on a purely *ad valorem* basis. Such an assessment is more representative of a "tax" or "duty" than of a charge recouping costs of port facilities.

That the HMT is excessive in relation to any benefit claimed to have been conferred on the payer is demonstrated by the fact that proceeds from the tax may be used to fund construction and maintenance projects which relate to future projects, rather than to repay the government for services actually rendered to the exporter. *See* Pet. App 60a. Indeed, the exporter paying the HMT may have received *no* services, if it has used a port where Federal maintenance funds have not been expended. Moreover, the fast-building surplus in the Harbor Maintenance Trust Fund, is indicative of the fact that the HMT is a tax, by Congress' own admission designed to raise revenue, and not a fee structured to recoup from exporters the costs of services rendered to them.[13]

---

[13] It is also significant, *amici* assert, that export HMT revenues are covered over into the national Treasury before being remitted to the Trust Fund, and the tax is considered to be "on budget", meaning that HMT collections may be counted for deficit reduction purposes. Pet. App. 51a.

CONCLUSION

The Export Clause makes possible a "freedom of exportation . . . guaranteed by the Constitution", which, this Court has recognized, "cannot be disturbed by any form of legislation which burdens that exportation. The form in which the burden is imposed cannot vary the substance". *Fairbank v. United States*, 181 U.S. at 295. The broad sweep of the Export Clause makes clear that any form of taxation which falls upon exported articles in the course of their exportation is strictly prohibited.

The HMT taxes "Articles exported" during the course of their exportation more blatantly than any tax this Court has considered before. The tax violates the letter of the Export Clause and works the very results the Framer's sought to avoid. That the HMT may be nominally imposed for the avowed purpose of defraying the government's costs of "port use" (or of raising a sum of money corresponding to the government's port maintenance expenditures) cannot, and does not, alter the purpose of the Export Clause, as conceived by the framers and consistently interpreted by this Court. Taxes and duties on exports, such as those imposed by the HMT, are strictly prohibited. In this case, the Congress has wielded a power of taxation which the Constitution expressly forbids.

Amici submit that this Court should uphold the Federal Circuit's decision striking down the export HMT as repugnant to the Export Clause of the Constitution.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA, PETITIONER

v.

UNITED STATES SHOE CORPORATION, RESPONDENT

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF AMICI CURIAE, ADDISON WESLEY LONGMAN, SILBOND CORPORATION, AND OTHERS LISTED ON INSIDE COVER, IN SUPPORT OF RESPONDENT

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39 pp

ADDITIONAL AMICI CURIAE
IN SUPPORT OF RESPONDENT

AL ZAMIL CO., INC.
C&D TECHNOLOGIES
CREWS, INC.
DESERT WHALE JOJOBA CO., INC.
EXPORT TRANSPORTS, INC.
OCI INTERNATIONAL INC.
OVERSEAS OPERATIONS, INC.
SCHOTT GLASS TECHNOLOGIES, INC.
UNIVERSAL BUSINESS CORPORATION
W.A. BAUM CO., INC.

QUESTION PRESENTED

Whether the harbor maintenance tax established by 26 U.S.C. §4461 violates the Export Clause of the Constitution by taxing goods in export transit from States of the United States, so that the law is repugnant to the Constitution and, therefore, void.

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STATEMENT OF INTEREST

The law firm of Carlos Rodriguez & Associates represents a number of exporters in complaints challenging the harbor maintenance tax in the Court of International Trade. While these actions are stayed pending the outcome of the "test case," *United States v. United States Shoe Corporation*, now before this court, we aim to present the position of our exporter clients in opposition to the harbor maintenance tax and in support of the respondent.

Consent to file this *amicus curiae* brief was granted by the Solicitor General and counsel for respondent. Their consent letters will be filed with this brief.

Southern interests at the Constitutional Convention in 1787 first advanced the notion of exports free from the burden of taxation and gathered support from the North as well. Today, our clients are representative of the trade-oriented United States economy of 1998. They come from all regions of this country--East, West, Midwest, North and South. Most of them are small and medium-size companies. They share a common desire to end the harbor maintenance tax that has burdened their export shipments and enmeshed them in bureaucratic procedures, forms, and payments engendering added administrative expenses.

Just as trade was important to the newly formed nation at the time of the Constitution, the United States is now the largest exporting

and trading nation, and export trade remains vitally important.[1]

On behalf of our clients as *amici curiae*, we hereby present factual, legal, and historical reasons why this Court should affirm the ruling of the Federal Circuit Court and declare void the harbor maintenance tax law which violates the Export Clause of the Constitution.

SUMMARY OF ARGUMENT

The harbor maintenance tax, called a "tax" by Congress, which pursuant to the "Harbor Maintenance Revenue Act," represents a burden directly on goods in export transit in violation of the Export Clause, Art. I, § 9, Cl. 5.

There is no question here as in the recent case of *International Business Machines v. United States(IBM)*, 517 U.S. _____, 116 S.Ct. 1793 (1996), as to whether this tax affixes directly to the goods. It does. The Water Resources Development Act of 1986 required that the tax be imposed upon loading of cargo onto vessels in export trade. 26 U.S.C. §4461(a)(1)(A).

The government which created this measure as an excise tax, cannot establish more than 10 years after the fact that this is a "user fee." The government's brief stays carefully away from Supreme Court decisions broadly

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1 United Nations, *World Economic and Social Survey, 1997, Trends and Policies in the World Economy*, at 256; U.S. Department of Commerce, *Statistical Abstract of the United States* (October 1997) at 807; and *United Nations, Monthly Bulletin of Statistics* (Oct 1997) at 126-161.

interpreting the Export Clause. Instead their argument focuses on the pretext of a "user fee," which is presented as an exception to the Export Clause. But cases cited by the government, such as *Evansville-Vanderburgh A.A. Dist. v Delta Airlines, Inc.*, 405 U.S. 707 (1972), and *Massachusetts v. United States*, 435 U.S. 444 (1978), are not really Export Clause cases; they relate to the Import-Export Clause, Art. 10, Cl. 3, and the Commerce Clause, Art. I, §8, Cl. 3. These cases are not directly relevant.

What's more, the harbor maintenance tax does not really tax users. The vessels are the direct users, and sometimes these vessels arrive in port or depart empty of any cargo. That means that these ships would use harbor facilities without paying any tax which is imposed *ad valorem* on the value of the cargo. The exporters are not the users of the ports, and yet they are taxed.

In the congressional hearings on the Water Resources legislation, the House Committee on Merchant Marine and Fisheries acknowledged that the benefit of ports maintenance really goes to the entire population. H.R. Rep. 99-251, part 1 at 5.

Most importantly, this legislation has produced huge amounts of revenue--billions of dollars--that have not been spent for the benefit of harbors, ships, or exporters. These harbor maintenance funds remain in the Trust Fund and may be invested by the Department of Treasury. The tax produces an excessive amount of money in relation to the harbor maintenance needs, costs and benefits.

Moreover, this Court has decided an unbroken line of cases interpreting the Export

Clause broadly from *Marbury v. Madison* in 1803, though wartime periods during the Spanish American War and World War I, and extending to the most recent affirmation of a strong and broad export clause in *IBM, supra.*.

The court has reached out beyond taxes placed directly on export to invalidate taxes on bills of lading and other services and documents related to exporting to reaffirm a strong Export Clause policy. This history of case law is fully consistent with the constitutional history of the Export Clause. The record of the Constitutional Convention is clear that the framers would accept no exception to diminish the power and force of that clause.

Our clients in this matter are small and medium size exporting businesses that have filed complaints in the Court of International Trade to challenge the harbor maintenance tax. They share the same interest in protecting exports from burdensome taxation as the businesses during the colonial period did in protecting their exports from taxation. Recent articles on exporting cited in our argument indicate that smaller business enterprises are the most dynamic part of the export economy of the United States. Therefore these businesses stand to lose if the tax is allowed to remain in effect in violation of the Constitution.

ARGUMENT

I. INTRODUCTION: HARBOR MAINTENANCE TAX LAW IS A REVENUE MEASURE THAT BURDENS TRADE

The harbor maintenance tax imposed pursuant to 26 §4461 is a "tax" imposed directly on the goods in the course of export commerce, accruing at the time of loading cargo intended for export. After the vessel, its crew and cargo, there is little more essential to export trade than harbors from which to load goods and embark.

While the tax appears to be minuscule at a .125 percent *ad valorem* based on the value of cargoes exported, $2.7 billion was already collected from shippers by 1994, including $700 million in export taxes. *United States Shoe Corp. v. U.S.*, 114 F.3d (Fed. Cir. 1997). And if the court upholds this tax, there is no reason why larger and more burdensome taxes may not be imposed by Congress upon exported goods.

Revenues from exportation naturally have increased during the 10 years since the Water Resources Development Act went into effect in 1987. During this period, the United States has been and remains the leading exporting nation in the world,[2] and the value of this country's exports has nearly tripled from $223.4 billion in 1986 to $624.7 billion in 1996. The

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[2] United Nations, *World Economic and Social Survey, 1997, Trends and Policies in the World Economy*, at 256; U.S. Department of Commerce, *Statistical Abstract of the United States* (October 1997) at 807; and United Nations, *Monthly Bulletin of Statistics* (October 1997) at 126-161.

combination of tripling the tax rate from .04% to .125% in 1991 coupled with the nearly tripled value of exports have made this seemingly small tax into a powerful engine of revenue production. At 1996 levels of export trade, that should produce $780 million per year in harbor maintenance tax proceeds from exports in one year alone.

Statistics on U.S. exports from the first half of 1997 are continuing the trend of increasing, huge volumes of exports. The U.S. exported more than $340 billion during the first half of the year alone, indicating an annual rate of $680 billion in exports.[3]

II. THE EXPORT CLAUSE SHOULD BE READ BROADLY TO PROTECT EXPORTS FROM TAXATION.

A. Constitutional history

According to constitutional law history, the Southern representatives to the Constitutional Convention insisted upon an Export Clause prohibiting taxation of exports from the United States and protecting the South and its exports in particular. "It seems to be feared that the Northern States will oppress the trade of the South," said Mr. Langdon, a delegate from New Hampshire, according to *The Records of the Federal Convention of 1787* (volume 2), edited by Max Farrand. And the favorable vote

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[3] United Nations, *Monthly Bulletin of Statistics* (October 1997) at 160-161

for the Export Clause at the Constitutional Convention was part of the compromises between regional and sectoral interests that produced the finished document.

But it is clear from the history of the convention that northern delegates from Massachusetts and Connecticut and New Hampshire stood with the South. Together, they withstood any attacks on the proposed Export Clause so that the strength of that clause would not be restricted in cases where taxes were not required for the purpose of revenue, or when a two-thirds vote of Congress established that it was necessary to tax exports.

James Madison thought that export taxes might be needed in the future, particularly during periods of war when an embargo would be necessary. *Id.* at 361. But, it was argued that to tax exports would discourage industry in the United States. *Id.* at 360.

When the proposal was "no tax shall be laid on exports," the measure passed by 7-4. And the actual language of the Constitution was simple, unequivocal and strong in opposition to placing any taxes upon exports from this country:

> No tax or duty shall be laid on articles exported from any state.

In his analysis of the export clause, as it pertains to recent export controls, Yale law School note writer Bruce Ackerman commented:

> ...[T]he Clause could be viewed merely as prohibiting a particular form of taxation, instead of extending broad constitutional protection to the export trade. But the records reveal a larger purpose. In fact, the delegates voted down an amendment which would have banned only those export duties imposed for the purpose of revenue...In leaving the Export Clause in tact, the Convention reached a deliberate decision to prohibit the government from burdening the export trade in any way.

Note, *Constitutionality of Export Controls*, 76 Yale L.J. (1966) at 202.

Furthermore, the Export Clause should not be viewed as merely the product of parochial economic interest of the South expressed in the form of a political compromise. This was a measure, as the Yale Law Journal note writer points out and the Farrand records support, was advocated by Northern delegates who voted for the measure to protect their own states' exports from burdensome taxation. According to the *Records of the Federal Convention*, a delegate named Clymer "remarked that every State might reason with regard to its particular productions, in the same manner as the Southern States." *Records, supra*, at 363.

Why then, did the founding fathers limit the prohibition against export taxation to "taxes" and "duties" as described in Article I, § 9, Clause 5. The Yale note writer points out that there were no other export charges or taxes in use in

the colonies for the preceding 50 years. So maybe they weren't aware of user fees in 1787 at the time of the convention. But they had covered every type of tax, duty, or burden they were aware of in a simple sweeping clause designed to protect exports from any burden.

B. <u>Case law supports a strong, broadly interpreted Export Clause</u>.

While the founding fathers made it clear that they wanted a broad prohibition against export taxes that burdened export trade, the federal judiciary began to make a long line of decisions in which a broad interpretation of the Export Clause was applied over a period of nearly 200 years.

In one of the earliest interpretations, Justice John Marshall made it clear that a law that was contrary to the Export Clause was simply unconstitutional and void. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803):

> It is declared that 'no tax or duty shall be laid on articles exported from any State.' Suppose a duty on the export of cotton , of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? Ought the judges to close their eyes on the constitution and only see the law? *Marbury v. Madison, supra*, at 179

Marshall answered his question: "...a law repugnant to the Constitution is void." *Id.* at 180.

During the Gold Rush, the Court held that California's stamp duty on the export of gold, silver, and gold dust was a violation of the

Import-Export Clause of the Constitution, and the law was held void. *Almy v. State of California*, 165 U.S. (24 How. 169) (1860). But the stamp was not placed directly on the merchandise, it was placed on the bill of lading for the shipment. Justice Tawney held for the court that it didn't matter. He and the court viewed the matter the same as a tax on exports that was unconstitutional. *Id.* at 174-175.

Although the *Almy* case presented a question arising under Article I, §10, Clause 2 of the Constitution, Justice Tawney said in *dictum* that the issue was directly analogous to the Export Clause:

> And if the law of California is constitutional, then every cargo of every description exported from the United States may be made to pay an export duty to the State; provided it is in the form of a tax on a bill of lading, and this is in direct opposition to the plain and express prohibition in the Constitution of the United States.

Almy, supra, at 174.

Not only did the Supreme Court read the Export Clause broadly, the Court expanded the concepts of the Export Clause's prohibitions to incorporate a penumbra of activities surrounding exporting that must not be touched by taxation: *e.g.*, sale of goods to a broker buying goods for a foreign customer; insurance policies for risk to exported goods bought from a foreign insurance firm; the bills of lading pertaining to export transactions; and stamp tax on charter parties,

imposed during war time. In these cases the Court has repeatedly said that taxing various related aspects of exports is essentially the same as taxing the exports themselves. The following represent Supreme Court cases in which the Court spread out a penumbra of protection around the Export Clause:

' --*Thames and Mersey Marine Insurance Company v. United States*, 237 U.S. 19 (1915): The Court held that taxes in the form of stamp taxes upon marine insurance premiums for exports violated the Export Clause and constituted burdens upon goods in export trade. The Court framed the issue in this case as to whether the marine insurance was so "vitally connected" with exporting that the tax on such policies is essentially a tax upon the exportation itself." The court responded:

> The answer must be found in the actual course of trade; for exportation is a trade movement, and the exigencies of trade determine what is essential to the process of exporting. The avails of exports are usually obtained by drawing bills against the goods; these drafts must be accompanied by the bills of lading and policies or certificates of insurance. It is true that the bills of lading represent the goods, but the business of exporting requires not only contract of carriage, but appropriate provision for indemnity against marine risks during the voyage. The policy of insurance is universally recognized as

> one of the ordinary shipping documents."

Id. at 26.

Just in 1996, the U.S. government challenged this interpretation in the *IBM* case, *supra*, claiming that provision of services collateral to the exported goods themselves should not be precluded from taxation. The present Court rejected the government's argument and reaffirmed *Thames and Mersey*. *IBM* at 1804 and *passim*.

--*A.G. Spalding & Bros v. Edwards*, 262 U.S. 66, 43 S.Ct. 485, 67 L.Ed. 865 (1923): Justice Oliver Wendell Holmes, wrote for the Court that he considered sale of baseballs and bats to a broker buying goods for a foreign customer in Venezuela to be sufficiently related to exports from the United States that a tax could not be imposed on the products consistent with the Export Clause.

Justice Holmes said that it didn't matter that title had not passed to the buyer and that a bill of lading had not yet issued; nor did it matter that the sales tax in question was a general tax affecting merchandise not in export trade. While acknowledging that goods may be taxed in the course of manufacture and before export, he said that the key fact was that the baseball equipment had been delivered to the carrier. *Id.* at 262 U.S. 69-70, 43 S.Ct. 486.

It should be noted that in this case, as in others[4] , the Export Clause is enforced strictly and broadly notwithstanding that the tax upon sale of baseballs and bats was pursuant to the World War I measure, the War Revenue Act of October 3, 1917, 40 Stat. 300, 316. In short, the court is saying that notwithstanding the exigent needs of financing the war effort, the Export Clause was to be enforced. The need for rasing wartime funds through export taxation or such taxes imposed in relation to a military embargo was considered by those present at the constitutional convention in 1787, and the notion that there should be an exception for wartime to the Export Clause was simply rejected. Article I, § 9, Clause 5 had no wartime exception when it was first approved, nor does it now.

--*Fairbank v. United States*, 181 U.S. 283 (1901): In this case, the Court stated that beyond prohibited taxes directly upon exported goods, the Court would strike down taxes upon bills of lading related to export trade. This tax on exported goods was only 10 cents and was imposed in the form of a stamp duty. Justice Brewer for the Court decided that although this was called a "stamp." it was really a tax repugnant to Article I, §9, Clause 5 of the Constitution. The court declared:

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4 Other cases upholding the Export Clause strictly and broadly notwithstanding wartime conditions are: *United States v. Hvoslef, supra*, the War Revenue Act of June 13, 1898; and*Thames & Mersey Marine Insurance Company, supra*, the War Revenue Act of June 13, 1898.

> The requirement of the Constitution is that exports should be free from any governmental burden. The language is 'no tax or duty.'

Id. at 290.

The court reasoned, in part, that although a 10-cent stamp duty appears to be small, the stamps can come in larger denominations, and, furthermore, "The power to tax is the power to destroy," the Court said at 291, quoting John Marshall from *Brown v. Maryland*, 25 U.S.(12 Wheat.)419, 425, (1827): "A power to tax, this Court has emphatically said, is a power to destroy." *Id.* at 425.

In *dictum*, Justice Brewer said that an *ad valorem* tax on all exports would not be permitted under the Constitutional restriction. *Fairbank, supra*, at 292. "In other words,. the purpose of the restriction is that exportation, all exportation, shall be free from national burden." *Id.*

--*United States v. Hvoslef*, 237 U.S. 1, (1915): The Court held that stamp taxes imposed by the federal government upon charter parties (*i.e.* contracts for lease of vessels) related to export trade and was unconstitutional and void pursuant to Article I, §9, Clause 5. Justice Charles Evans Hughes spoke for the court as he observed that the Export Clause is more than just a protection against taxes laid directly on the goods in export transit:

> This constitutional freedom, however, plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than that the obstructions to exportation, which it was the purpose to prevent, could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it.

Id. at 13.

However, the court has not expanded the Export Clause to include such pre-export activity as manufacturing these pre-export activities may be taxed even if the goods in question eventually enter the stream of export commerce. *Pace v. Burgess*, 92 U.S. 372, 376 (1875); and Turpin *v. Burgess*, 117 U.S. 504, 6 S.Ct. 835, 29 L.Ed. 988 (1886); *Cornell v. Coyne*, 192 U.S. 418, 24 S.Ct. 383, 48 L.Ed. 504 (1904). None of these cases, however, represents a contradiction to the broad interpretation of the Export Clause as discussed and cited above. Obviously, the exports in the *United States Shoe* case are not "pre-export activity," they are exports squarely in the stream of commerce.

The same broad reading and penumbral approach to the Export Clause employed since the early history of the Constitution has been employed recently in *United States v. International Business Machines(IBM)*, *517 U.S.* ___, 116 S.Ct. 1793, 135 L.Ed. 124 (1996) in which the court struck down a nondiscriminatory tax on exports in the form of taxing the insurance premiums paid to foreign insurers for the insurance protection of export goods.

The dissenters, Justices Kennedy and Ginsburg, argued vigorously that mere services

performed for the benefit of export activity should not receive the same constitutional protection under the Export Clause as given to taxes upon the exported goods in the stream of export commerce. *Id.* at 1804 *et seq.*

In the present case before the Supreme Court, the Harbor Maintenance tax falls directly on the goods in export transit. In fact the law states that exported goods become subject to the harbor maintenance tax upon loading for the purpose of exportation. 26 U.S.C. §4461. Therefore, the concern of those dissenting justices in *IBM* should not be a concern in *United States Shoe Corporation.*

The Supreme Court stated, "The point to guard against is the imposition of a duty under the pretext of fixing a fee." *Pace v. Burgess, supra,* at 376. And the court also advised that each case must be judged on its own circumstances.

The imposition of duty under the pretext of fee is exactly what we have in *United States Shoe Corporation:* Congress, describing its legislative creation as a tax, also described it as a user fee. 26 §4461 (a) and §4462(a) Congress acknowledged that in a trading country where most of the import and export trade comes through the ports, the general population benefits from harbor maintenance and dredging. H.R. Rep. No. 251,, 99th Cong., 1st Sess., part 1 at 5 (1985). Congress clearly stated that the vessels are the direct users of the ports and then proceeded to impose the "tax" on the exporters who do not use the ports? Is this a user fee, or is it really "a duty under the pretext of a fee," as described in *Pace v. Burgess, supra.?*

III. THE HARBOR MAINTENANCE TAX IS NOT A USER FEE, IT IS AN UNCONSTITUTIONAL TAX ON EXPORTS

A. The "harbor maintenance tax" is a tax

This measure was included in Public Law 99-662 (the Water Resources Development Act of 1986 under Title XIV of the Act, which is titled "Revenue Provisions." Under Section 1401 of that title, the law states, "This title may be cited as the "Harbor Maintenance Revenue Act of 1986."

The measure, passed by Congress in 1986, has proven to be a marvelous revenue raiser far beyond the needs of the government to contribute to the costs of harbor maintenance, improvements, construction, and dredging, as the bill was designed by Congress to do.

During the period this law and its 1990-1991 amendments have been in effect, the tax has more than tripled from .04% to .125 percent at a time when the exports of this country have nearly tripled. P.L. 99-662 § 1401 *et seq.* and P.L. 101-508, § 11214.

The government reports and projects dramatic increases in HMT revenues from in excess of 622 million in the 1994 fiscal year to a projected 790 million in the 1999 fiscal year with growth of net funds available in the Trust Fund expected to more than double from 1994 to 1999, with an estimated $2,183,805,000 available in the fund in that year, according to the *Third Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Year 1994* at 6 (Record at 140).

The Fund shows an actual surplus of funds over expenditures in fiscal 1994 of $452,360 while projecting a surplus in fiscal year 1999 of $1.66 billion. *Third Annual Report, supra,* at 5-6 (Record at 139-140).

The makers of the 1994 report indicate that they sincerely hope that Congress will pass new legislation designating the National Oceanic and Atmospheric Administration (NOAA) as a beneficiary of HMT trust funds to alleviate the growing surplus in the account. This is an admission by the government that its revenue raising for harbors is much more than is needed for that purpose, and other purposes need to be found to spend the funds. Record at 140-141.

Congress knew even during the committee hearings on the bill in 1985-86 that they had a constitutional problem on their hands, according to the statement of Congressman Jones of North Carolina submitted to the Committee of the Whole House. He quoted the Export Clause and added:

> Whether characterized as a tax or a fee, to the extent that such a levy is construed as primarily for the purpose of revenue raising, it is tantamount to a tax on export and in part unconstitutional.

H.R. Rep. No. 251, 99th Cong., 1st Sess., part 4 at 22-23 (1985) (Record at 101-102).

The Harbor Maintenance Trust Fund, created under Internal Revenue Code §9505 indicates that the fund commingles harbor maintenance tax revenues as well as monies raised by the St. Lawrence Seaway fund. 26 U.S.C. §9505(a)(1-2). And when the Water

Resources Development Act was first enacted in 1986, it provided for only 40% of funding for harbor maintenance project in a cost sharing program with state and local governments. P.L. 99-662 at 1401 *et seq.* This was later in 1991 increased to 100%. P.L. 101-508 §316. Some of these funds can be <u>invested</u> by the Secretary of the Treasury if they are not being actually used for harbor maintenance projects. Internal Revenue Code §9602(b)

Congress first labeled this measure a tax and the measure was placed in Chapter 36 of the Internal Revenue Code, Title 26 under "Certain Other Excise Taxes," Subchapter A, "harbor maintenance tax." The law states succinctly under the heading, "Imposition of tax," "There is hereby imposed a tax on any port use." The law continues, "The amount of the tax imposed by subsection (a) shall be an amount equal to 0.125 percent of the value of the commercial cargo involved."

Subsection (c) provides: "Liability and time of imposition of tax. (1) Liability. The tax imposed by subsection (a) shall be paid by..." The law further provides that "the tax imposed by subsection (a) shall be imposed in the case of cargo exported from the United States at the time of loading."

Hence this is a tax to be based on cargo loaded onto ships for export, in the stream of export commerce. The "tax" is referred to repeatedly in the law in creating exemptions from "tax," for example, for the United States 26 U.S.C. §4462 (e), and for cargo imported in bond for immediate exportation, 26 §4462(d) The law further states that the "tax" is imposed only once when cargo is unloaded and reloaded

onto the same vessel. 26 §4462(g)(1). In addition to the references quoted above, there are a number of other references in §§44612-4462 to the Congress's designation of this measure as a "tax."

Given that the United States Congress has been passing tax measures for more than 200 years, we submit that deference should be given to the Congress's designation of this measure as a "tax."

Congress in preparing and passing this legislation naturally believed this was a tax in the form of an involuntary contribution for the benefit of the general welfare, because the United States government as a whole had born these costs from the general revenues prior to the 1986 enactment of the harbor maintenance tax legislation. H.R. Rep. No. 99-251, part 1, *supra*, at 5.

U.S. legislation and supporting case law have defined "tax" many different ways over a long period of time and there are obviously many different types of taxes described and collected in this country. *E.g.*, this Court has treated the stamps placed upon bills of lading and charter parties as taxes, even though they may have been described as just "stamps." *Fairbank*, and *Hvoslef, supra*.

Given the history of this Court's interpretations of the Export Clause, any new tax measure that directly burdens export commerce, such as this HMT should be viewed with intense, heightened scrutiny.

Even the dissenters in the *IBM* case, supra, acknowledged, quoting from *Hvoslef, supra*, in part:

> 'The protections of the Export Clause must extend, perhaps, somewhat beyond specific taxes on goods, for "[i] f it meant no more than that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it.' *Hvoslef, supra*, at 13, S.Ct. at 463. As a result, the Court has found certain taxes to be proxies for taxes on the goods...

International Business Machines, supra, at 1812.

The term proxies used by Justice Kennedy sounds a lot like, "The point to guard against is the imposition of a duty under the pretext of fixing a fee," said by Justice Bradley in *Pace v. Burgess*. We submit that this is the very thing we ask this Court to guard against here because we contend that the so called "user fee" alleged here by the government is simply a tax wrapped in a pretextual or proxy label.

In passing legislation creating the Harbor Maintenance Tax and the related Trust Fund, Congress declared that the revenues and program would be administered by the Customs Service for collection of the tax. 26 §4461 (f) states that in administration and enforcement this tax shall be treated as a customs duty and the Customs Service is authorized to treat the "tax," as if such tax were a customs duty." *Id.*

Of course, a customs duty is a duty, which

is a type of tax imposed upon imported goods.[5] These are also known as "tariffs," which are taxes levied upon imported goods. Furthermore, these customs duties are charged *ad valorem* on the imported goods, precisely in the same manner that Congress charged the harbor maintenance tax *ad valorem* on exported goods. 26 U.S.C. §4461(b). Antidumping and countervailing duties are also *ad valorem* taxes on imports administered by the Customs Service. 19 U.S.C. §§1671(e), and 1673.

B. The harbor maintenance tax is not a user fee; it is a pretext for an unconstitutional tax.

The harbor maintenance tax should not be interpreted as a user fee in the face of a strong constitutional provision protecting exports from the burdens of taxation. A loophole should not be created for so-called user fees to circumvent the policy of the Constitution to protect exports. For many factual and legal reasons, this harbor funding measure is not a user fee:

Although we reject the proposition that this is a user fee, we state *arguendo* that the characteristics of user fees are not present for

[5]Duties. In its most usual signification this word is the synonym of imposts or customs; i.e. tax on imports; but it is sometimes used in a broader sense, as including all mannner of taxes, charges, or governmental impositions. *Blacks Law Dictionary*. 6th Edition.

this harbor maintenance device. Nor are the criteria for such fees met.[6]

1. This tax is not charged according to use. Ships entering the ports and benefiting from port facilities generate no tax when they enter or leave a harbor empty of any load. The empty ship uses the port and requires a dredged channel as much as the ship entering laden with cargo.

Then, this is a tax for "use" only when exports or imports are transported but not when other ship users are entering or leaving the ports. In short, this is a tax that burdens exports but does not necessarily charge for use of the port by ships unrelated to movement of cargo.

Initially an amended version of the bill would have imposed a lower rate of tax upon ships entering a port only for service or repairs, but this proposal did not turn up in the final bill that was enacted into law. S. Rep. No. 228, 99th Congress, 1st Sess., at 2. The law actually does not charge ships coming into port empty whether they are there for repairs or not. 26 U.S.C. §§4461-4462.

2. Users of the ports are not the only beneficiaries of harbor spending by the federal government. The U.S. population is, as reported

[6] *Massachusetts v. United States*, 435 U.S. 444, 98 S.Ct. 1153, 55 L.Ed. 2d 403 (1978): The court set forth several criteria for a valid user fee: (1) is nondiscriminatory; (2) represents a fair approximation of the cost of benefits received from the federal government; (3) is not excessive in relation to the cost of benefits supplied. Id. 98 S.Ct. at 1155-1156, and 435 U.S. at 445.

by Congress: "Moreover, the United States ports constitute and essential element of the Nation's transportation system, making possible the import and export of goods to the benefit of the entire population." *Report of the Committee on Public Works and Transportation with respect to the proposed Water Resources legislation in 1985*, H.R. Rep. No. 251, 99th, 1st Sess., part 1 at 5, *supra*.

3. The exporters do not directly use the ports any more than the population as a whole directly uses the port system. The vessel owners are the users of the ports and yet these users are not charged any taxes or fees pursuant to 26 U.S.C. § 4461. In short, those that use the ports are not taxed or charged while those exporters who do not directly use the ports are taxed. Given that the government has described this tax as a "user fee," it is not charged against the users. Congress had to reach out to these nonusers of the ports and did so only when their exports were loaded on ships and were in the stream of export commerce. That was a constitutional mistake under Article I, §9, Clause 5.

4. The HMT is an excessive charge against exporters. We have cited statistics in this brief that the government is raising much greater amounts of tax revenues from the exporters than is needed to carry on harbor maintenance and construction. *Infra* at 5-6.

5. The tax is charged on the <u>value</u> of cargoes in export commerce rather than according to use of harbor facilities. An empty ship entering the harbor pays nothing. A ship loaded with expensive technological equipment is charged much more than a shipload of rice or

wheat that uses the same size ship and same amount of port facilities but has a lower value. Senator Packwood's Senate Finance Committee apparently was under the impression that this fee was charged for use of the ports by vessels, when it stated: "The committee amendment imposes a charge on use by a commercial vessel of a harbor or channel ("port)") in the United States for loading or unloading of commercial cargo on or from the vessel. That provision did not become the basis of the law that taxed exporters according to value of shipments. S. Rep. No. 228, 99th Cong., 1st Sess., at 1.

The same report says that the bill would create "port user fees" and that these fees would be paid by the direct beneficiaries of such expenditures." *Id* at 5. The report again says that it is the use by commercial vessels that engenders the so-called "user fees."

In short, the legislative history of this legislation indicates that the members of Congress had some confusion about what they were passing into law as a harbor maintenance tax to be paid by exporters according to the value of cargo loaded, or whether they expected this HMT to be paid by the vessel owners that used the harbor facilities.

We need not address the question of whether this tax is discriminatory or not given that this Court has held for a long period of time and most recently in the *IBM* case, *supra*, that any tax placed on exported goods is a violation of the Constitution, Article I, §9, Clause 5, regardless of whether it is discriminatory or nondiscriminatory. *IBM*, supra, at 1797.

C. The Trust Fund created by the Harbor Maintenance Revenue Act of 1986 is not repository of revenues that can only be used for port maintenance; surplus revenue continues to accumulate.

We take exception to the government's argument that the tax is deposited in a trust fund and can only be withdrawn for use of maintaining and operating ports (Pet. Brief at13). The Water Resources Development Act, P.L. 99-662 and 26 U.S.C. § 9505(c), provides that in addition to certain harbor projects described in Section 210(a) of the act; the Department of the Treasury is permitted to spend up to $5 million and administration of the trust fund and harbor maintenance tax receipts. Additional funds may be spent "for payments of rebates of tolls or charges pursuant to section 13(b) of the act of May 13, 1954." §9505 (c)(2). (These are rebates of St. Lawrence Seaway tolls.).

D. Surpluses in the Trust Fund are escalating.

Moreover, the Trust Fund does not merely reflect the occasional surplus one year and deficits in other years depending on needs and proceeds received, as argued by the government (Pet. Brief at 17): The government's assertion that the level of funds required "fluctuates over time," is not supported by the facts on the record in this action. The record shows a constantly escalating production of surplus funds during the period 1989 through and including projected needs and revenues for 1999. Third Annual Report to Congress, supra at 3 and 5-6 (Record at 137, 139-140). Although surpluses

started modestly with $12,312,000 in the 1989 fiscal year, those surplus levels are projected to increase to $1.3 billion in the 1998 fiscal year and $1.66 billion in fiscal 1999. In short, this is not a record of "fluctuation," but instead is a constant escalation of surplus revenue generated by the harbor maintenance tax.

IV. THE IMPROPER EXERCISE OF TAXING POWER BY CONGRESS IN VIOLATION OF THE EXPORT CLAUSE HAS A GREATER IMPACT ON SMALL AND MEDIUM-SIZE BUSINESSES.

The larger companies, such as Texaco Refining and Marketing, Inc., Amoco Chemical Company, and E.I. Dupont de Nemours & Company, *amici* in the Federal Circuit Court,[7] have been exporting for a relatively long time and these are established multinational corporations. But a recent study by Federal Express shows that the small business are leading the growth in exporting that the United States economy has experienced for the past 10 years and is continuing.[8]: *The Journal of Commerce*, relying on the Federal Express study, said:

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7 List of Harbor Maintenance Tax Cases, Record at 80-84.

8 *Journal of Commerce*, Nov. 10, 1997, at 5a; and United Nations, *World Economic and Social Survey, 1997, Trends and Policies in the World Economy*, at 256; and U.S. Department of Commerce, *Statistical Abstract of the United States* (October 1997) at 807.

> Small businesses have become a driving engine of U.S. trade, and nearly all of them are expanding for five-year plans that will make them even bigger contributors to the economy...
>
> Small business exporters are an important component of the U.S. economy, and their growing participation in exports over the last decade--from fewer than 10% of all small manufacturers just five years ago to more than 18% today--has been spurred by changing technology and increasing expertise, some experts said.

THE JOURNAL OF COMMERCE, *Small Firms Drive Exports*, Nov. 10, 1997 at 5A.

The impact of taxing the exports of our client companies is to burden and discourage the most dynamic part of this country's exporting economy. In 1787 when the Export Clause was drafted there were no huge multinational companies like Texaco and Dupont. Companies were smaller in a nation of 3 million people and many of them were eager to trade and were actively engaged in trade.[9] It was just this type of export trade that the framers must have had in mind when they prohibited taxation of exports by the United States government.

Collectively the amount of harbor maintenance taxes paid by our clients, according

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[9] 2 FARRAND, *supra*, at 305-308, 359-364

to complaints filed in the Court of International Trade, is in approximately $335,000, representing the tax on $268 million in shipment value.[10] Although this amount may be a small percent of their total shipments during the past 3 3/4 years, this represents a burden that under the Article I §9, Clause 5 of the Constitution should not be imposed.

The tax has a relatively greater burden on small and medium size business, because the tax is a greater percentage of their total income and net income from exports than for large businesses. In short, the effect of the tax is to discourage exports, especially by small and medium-size businesses.

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[10] The firm represents the following plaintiffs in pending actions in the Court of International Trade (CIT) related to the test case of *United States v. United States Shoe Corporation*: Export Transports, Inc., Case No. 96-11-02567; Desert Whale Jojoba Company, Inc., No. 96-10-02354; OCI International Inc., No. 97-10-01737; C&D Technologies, Inc., No. 97-10-01887; Addison Wesley Longman, No. 97-11-02029; Schott Glass Technologies, Inc., No. 97-11-02000; Silbond Corporation, No. 97-11-02014; W.A. Baum Co., Inc. , 97-11-01968; Crews, Inc., No. 97-12-02075; and Al Zamil Co., Inc., No. 97-11-01978; Overseas Operations, Inc., No. 97-12-02153; and Universal Business Corporation, Case No. 97-12-02194.

V. CONGRESS IS NOT EMPOWERED BY THE COMMERCE CLAUSE TO VIOLATE THE EXPORT CLAUSE.

There is nothing in the Water Resources Development Act of 1986 applicable to harbors and Title XIV of the Act, known as the "Harbor Maintenance Revenue Act" that is regulatory. The pertinent portions of the act, codified in 26 §§4461, 4462 and 9505, simply impose a tax and provide for a method of collection as well as a Trust Fund repository of harbor maintenance revenue. Hence Congress's enactment of this legislation and its amendments was not a congressional exercise of regulatory power pursuant to the Commerce Clause of the Constitution, Article I, Section 8 ("To regulate Commerce with foreign Nationals, and among the several States, and with the Indian Tribes.")

Case law clearly acknowledges that Congress has great power over commerce, to tax, among its many powers; but there are certain limitations and restrictions built into the Constitution that delimit the exercise of Congressional power. The Export Clause is one of these few limits.

In *Gibbons v. Ogden*, 22 U.S. (9 Wheat) 1 (1824), Justice Marshall said of the commerce power, "It is the power to regulate." He said the commerce power "acknowledges no limitations, other than are prescribed in the Constitution." *Id.* at 196-197.

All of the cases cited in this brief in support of the Export Clause underline the limitation of commerce and taxing powers of Congress in the matter of placing burdensome taxes on exports.

VII. CONCLUSION

The judgment of the Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted.

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No. 97-372

JAN 15 1998
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,
Petitioner,

v.

UNITED STATES SHOE CORPORATION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE AMOCO CHEMICAL COMPANY IN SUPPORT OF RESPONDENT UNITED STATES SHOE CORPORATION

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No. 97-372

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE AMOCO CHEMICAL COMPANY IN SUPPORT OF RESPONDENT UNITED STATES SHOE CORPORATION

STATEMENT OF INTEREST OF AMICUS CURIAE [1]

The Amoco Corporation, having its principal place of business in Chicago, Illinois, is a manufacturer of a wide

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[1] This brief was drafted entirely by counsel for *amicus curiae* Amoco Chemical Company without assistance, monetary or otherwise, from counsel for either party.

variety of hydrocarbon based products including motor fuel and other fuels, refined petrochemical and natural gas products and semi-finished chemical products. Among its activities, Amoco Corporation, including its subsidiary Amoco Chemical Company (hereinafter "Amoco"), (plaintiff in a related refund case currently stayed before the United States Court of International Trade), exports, imports and ships in coastal traffic substantial quantities of materials subject to the Harbor Maintenance Tax ("HMT"). Amoco exports large quantities of such products as styrene, which is a basic building block chemical for the production of polystyrene plastic resins, and purified terephtalic acid "PTA", a major raw material for the production of polyester resins. Amoco utilizes intercoastal shipping in the United States for shipping intermediate and finished goods to and from its various refineries and distribution points located throughout the country. In addition, Amoco imports substantial quantities of crude oil which is subject to the HMT. To date, Amoco has paid millions of dollars in HMT on exports, imports and coastwise traffic.

Amoco has reviewed in depth and fully supports the basic arguments on constitutionality offered to this Honorable Court in the brief filed by Respondent, United States Shoe Corporation. In the interests of judicial economy, Amoco will not repeat those arguments in this brief. At the same time, Amoco believes that this brief may offer an insight to the Court relative to how the economic concerns of the Framers supporting the prohibition of a tax on exports are as dynamic and significant in international commerce today, as they were at the time the Constitution was being drafted.

As a major United States exporter, Amoco is sensitive to the importance of maintaining a strong industrial base in this country. Amoco also understands the nature of competitive conditions in world markets. It is fundamentally inconsistent with the economic interests of the United States for any tax to be assessed on exported merchandise. This, we believe, was fully recognized in 1789 when the Founding Fathers debated, and finally approved, a Constitution that expressly prohibits the establishment of such a pernicious tax.

In practical terms, Amoco is competitively disadvantaged by the harbor maintenance tax. The present amount of the tax, when aggregated, is a significant factor affecting the profitability of many export businesses. Indeed, the tax could easily affect whether a company would enter into an export transaction, given the extremely competitive world wide market conditions under which commodity chemical products are sold at historically low profit margins. In the case of Amoco, the assessment of the HMT is another factor facing Amoco in fulfilling its export marketing strategies. No exporter should have to contend with government-established disincentives to export business.

Amoco is convinced that the Drafters of the Constitution envisioned that a tax, such as the Harbor Maintenance Tax, should not be instituted by the Federal Government. Clearly, the assessment is by its own definition and character a tax, and not merely a fee, as argued by the Government. The history of the Framers' debates on the Export Clause demonstrate that they intended to enact the Clause because of its sound economic underpinnings. Because the tax impinges

directly on Amoco's ability to compete in the critical export markets of the world, the constitutionality of the tax is of great importance to it.

STATEMENT OF CONSENT

Amicus Curiae Amoco Chemical Company has obtained the consent of both parties to the filing of this brief in support of respondent United States Shoe Corporation, as indicated in the enclosed letters.

SUMMARY OF ARGUMENT

A primary intent of the Framers in enacting the Export Clause was clearly to avoid a factional conflict between the exporting Southern states and the majority Northern states. Concerns were also expressed in the Constitutional Convention that the power to tax exports would be exercised improperly if granted to the national government. In addition to those primary concerns, the Framers clearly considered and understood the advanced (for the day) economic rationale that eliminating taxes on exports would operate to the greater benefit of the country as a whole. Those concerns remain valid today, especially in view of the highly integrated nature of the international and domestic economies.

As one of the few restraints on the Congressional power to tax, the Export Clause should be staunchly defended against surreptitious incursions such as the tax before the Court. The Harbor Maintenance Tax ("HMT") is an *ad valorem* tax laid upon the value of exported cargo. A more clear example of a tax on exports is difficult to

envision. Congress should not be permitted to make such an obvious encroachment upon the clear terms of the Constitution.

Practically speaking, if the HMT is allowed to stand as written, and if the Government's arguments are taken to their necessary conclusions, Congress would be essentially unimpeded from taxing exports for any other purpose it can devise, either by inventing a "connection" between exports and the "service" being provided, or by increasing the tax rate to a level even more disproportionate in relation to the service provided than is currently the case. If the Court should approve the HMT in its current form as the Government argues, there would be essentially no upper limit on how high Congress could tax exports, because the current rate of taxation bears no relation to the costs of the purported benefits being provided. Indeed, the tax each year raises approximately 133% of the cost of the purported benefits, and that ratio is growing each year.

Projections from the *Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund for Fiscal Years 1995 and 1996* ("Annual Report") show that, at average levels of increase, the HMTF will have an accumulated surplus of $6.5 billion in 2005, $14.5 billion in 2010, and over $57 billion in 2020. This shows that the Framers were correct to be wary of taxes on exports, however small. Once a tax has been established, it inevitably grows, as will the progressively accumulating surplus in the HMTF.

ARGUMENT

I. The Framers Intended That The Federal Government Be Prohibited From Establishing Taxes or Similar Burdens on Export for Sound Economic Reasons that Remain Valid Today

Article 1, Section 9, Clause 5 of the Constitution provides that "No Tax or Duty shall be laid on Articles exported from any State." This clause formed an essential part of the political compromise necessary for ratification of the Constitution. After the Declaration of Independence, the states joined together under the Articles of Confederation. But because the Articles lacked a strong central authority, states with seaports discriminated against other non-port states by charging duties on goods shipped out of state.[2] Many states passed tariff laws to benefit themselves at the expense of neighboring states.[3]

The Export Clause compromise was essential to the adoption of the Constitution, for it removed a power from the states which they had abused, and prevented the Federal Government from exercising a power that had a great danger of abuse. *See*, L. Abramson, *State Taxation of Exports: The Stream of Constitutionality*, 54 N.C.L.Rev. 59, 60-63 (1976). The Southern states

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[2] *See, The Federalist Papers*, Federalist No. 42, at 305 (B. Wright, ed. 1961) (A. Hamilton); *see also*, *Michelin Tire Corp. v. Wages*, 423 U.S. 276, 283-5 (1976).

[3] Editor's Introduction to *The Federalist Papers*, Penguin Books, (I. Kramnick, ed 1987), at 20.

were concerned that if the Northern states had control over the Federal Government they would tax exported products, which were the South's main source of revenue. In addition, concerns were expressed that the power to tax exports would be exercised improperly if granted to the national government. Both policies must be vindicated in any review under the Export Clause. *Fairbank v. United States*, 181 U.S. 283, 292 (1901) (prohibition applies not only to prevent discrimination among the states, but also to prevent the Federal Government from imposing an *ad valorem* tax on all exports).

A principal concern was that the Northern states would impose duties on exported goods, which were a major source of income for the Southern states. This concern was equal in importance for the Southern states to their fears that the new Constitution would outlaw slavery. At the Constitutional Convention, Gen. Pickney, delegate of South Carolina, issued a warning just before the convention delegates were to turn over their agreed-upon resolutions to the Committee of Detail that "If the committee should fail to insert some security to the Southern states against an emancipation of slaves and taxes on exports, I shall be bound by my duty to my state to vote against their report." 2 *Records of the Federal Convention* 95 (M. Farrand ed. 1934). The Committee on Detail returned a draft text that included a prohibition on taxes on exports, which was approved after extended debate. *Id.*, at 183.

Several attempts to change the text of the Clause demonstrate the true intent of the Framers. During the debate of the clause one delegate attempted to insert the

words "for purposes of revenue," after the word "duty" in the text of the Export Clause, but his motion was voted down. 2 *Records of the Federal Convention* at 363. By rejecting that restriction the Framers showed that export taxes or duties were intended to be prohibited for whatever reason, whether for purposes of revenue or not. The Framers did not care if the tax was a "fee for service" or an *ad valorem* duty: both were prohibited.

The restriction on taxing exports was arguably even meant to avoid paying for expenses associated with exports. James Madison noted that the exporting states wished to retain the power to lay duties on exports "to enable them to pay the expenses incurred." 3 *Records of the Federal Convention* at 328-29. This proposal was rejected following agreement to the Import-Export Clause, which, as discussed in Respondent's Brief, allows duties or taxes in very limited circumstances. Therefore, taxes on exports, *even to pay for expenses incurred by states on behalf of exporters* were intended to be prohibited by the Framers, except as provided in the Import-Export Clause.

In addition to the political reasons for the Export Clause, the Framers understood that taxing exports was a dangerous though attractive power that should be curbed, because many states had imposed such taxes under the Articles of Confederation. Some delegates were concerned that the power to tax exports would be exercised improperly if granted to the national government. 2 *Records of the Federal Convention* at

308 (Statement of Mr. Sherman). Oliver Ellsworth, delegate from Connecticut, argued that,

> There are solid reasons agst. Congs taxing exports. 1. it will discourage industry, as taxes on imports discourage luxury. 2. The produce of different States is such as to prevent uniformity in such taxes. there are indeed but a few articles that could be taxed at all; as [tobacco] rice & indigo, and a tax on these alone would be partial & unjust. 3. The taxing of exports would engender incurable jealousies.

2 *Records of the Federal Convention*, at 360. In broadsheets covering and discussing the Constitutional Convention, taxing exports was condemned as "the acme of impolicy."[4]

We believe that if the Framers had been presented with the HMT, they would have condemned it as vehemently as they condemned state taxes on exports while drafting the Constitution. It has all the pernicious aspects of those earlier taxes on exports. The Framers inserted the Export Clause in the Constitution to prevent the types of rivalries that are now developing due to a loss of business by certain U.S. ports to Canadian and Mexican ports, in

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[4] "Reply to Mason's 'Objections': Civis Rusticus," Virginia Indep. Chronicle, Jan. 30, 1788, *reprinted in*, Part One, *The Debate on the Constitution*, (Library of America, New York, 1993) at 361; *see also*, "Answers to Mr. Mason's Objections to the New Constitution," "Marcus" (James Iredell), Norfolk and Portsmouth Journal, March 19, 1788, *reprinted in*, Part One, *The Debate on the Constitution*, at 394-95.

order to pay for improvements made in ports farther away from our neighbors. *See*, 141 Cong. Rec. E519 (extension of remarks, March 6, 1995)(Rep. McDermott); "Ports Try Tax Breaks To Reel In Business," *Journal of Commerce*, April 6, 1995, at 1A, 8A. Because the HMT so closely matches the Framers' concerns, the Court must reject the Government's arguments and find that the HMT, as applied to exports, is an unlawful "tax or duty".

II. Establishment of the HMT and Increasing the HMT Rate, was Precisely What the Framers Intended to Prevent With the Export Clause

Congress passed the bill containing the Harbor Maintenance Tax as part of a larger political compromise on one of the largest water project authorization bills ever: the Water Resources Development Act of 1986 ("WRDA"), P.L. 99-662, 100 Stat. 4082 (November 17, 1986). The WRDA authorized funds for hundreds of water projects that had been bottled up in Congress for almost ten years, including mostly non-harbor dredging projects. *See*, P.L. 99-662, Titles II-VI, 100 Stat. at 4089-4149, for a list of over two hundred water projects authorized by the WRDA. But aside from imposing the HMT on shippers, the WRDA imposed no new regulations on vessels or shippers.

When no one objected strenuously to the new tax (because it was very low and the Government did not enforce the tax on exports), the Administration and Congress took the opportunity to more than triple the tax, while at the same time assuring a tidy surplus, which could be counted as an effort toward reducing the federal budget deficit. The HMT was increased from 0.04 percent of

cargo value to 0.125 percent by the Revenue Reconciliation Act of 1990, which was included in the Omnibus Budget Reconciliation Act of 1990 ("OBRA"), P.L.101-508, 104 Stat. 1388 (Nov. 5, 1990). Unlike the original HMT in the WRDA, the three-fold increase in the tax rate was not necessary in order to obtain agreement of the Administration for authorizing new water projects; the increase was a simple money grab. Like the WRDA, the Revenue Reconciliation Act and OBRA included no regulation of shippers. None of the congressional reports give any substantive reason for the need to increase the tax, other than increasing revenues or lowering the deficit. *See*, H.R. Rep. No. 881, 101st Cong., 2d Sess., at 288 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 2017, 2290; H.R. Conf. Rep. No. 964, 101st Cong., 2d Sess., at 1055 (1990), *reprinted in*, 1990 U.S.C.C.A.N. 2374, 2760. Note that in the OBRA, the clause providing for the increase in the HMT was included in Title XI, "Revenue Provisions," and not in Title X, "Miscellaneous User Fees and Other Provisions." P.L. 101-508, 104 Stat. 1388-385, -400, -436. The HMT rate increase was passed along with other deficit reduction items, an indication of the effect that Congress intended the rate increase to have.

The increase in the HMT tax rate validates the Framers' suspicions of government taxation of exports. Once such taxes are allowed, they will inevitably increase. The Export Clause is meant to protect against such taxes, no matter how small. Despite the Government's arguments and some of the statements in the legislative history to the WRDA, the HMT was meant as a "revenue enhancer" from the very beginning. The legislative history of the OBRA shows that the trebling of the HMT rate was clearly intended to provide "revenue

reconciliation" as a "user-related tax", thereby providing meaningful deficit reduction. However, while deficit reduction is a laudable goal, the Export Clause prohibits revenue-raising taxes from being placed on exported goods.[5]

That the HMT is a revenue measure, and not a fee-for-service, can also be seen by review of the collections and expenditures made from the Harbor Maintenance Trust Fund ("HMTF"). As shown in the following charts, the trust fund operates at a significant annual surplus. Revenues increased (or are projected to increase)[6] in the years 1991-2001 at the rate of 11 percent, while expenditures will increase by only 4.05 percent. The Annual Report information is found on the charts entitled "HMTF Balance Sheet 1991-2001" and "HMTF Annual Accumulated Surplus 1991-2001". Following those charts are two similar charts showing projected increases in the trust fund at the historical (11% and 4.05%) rates of

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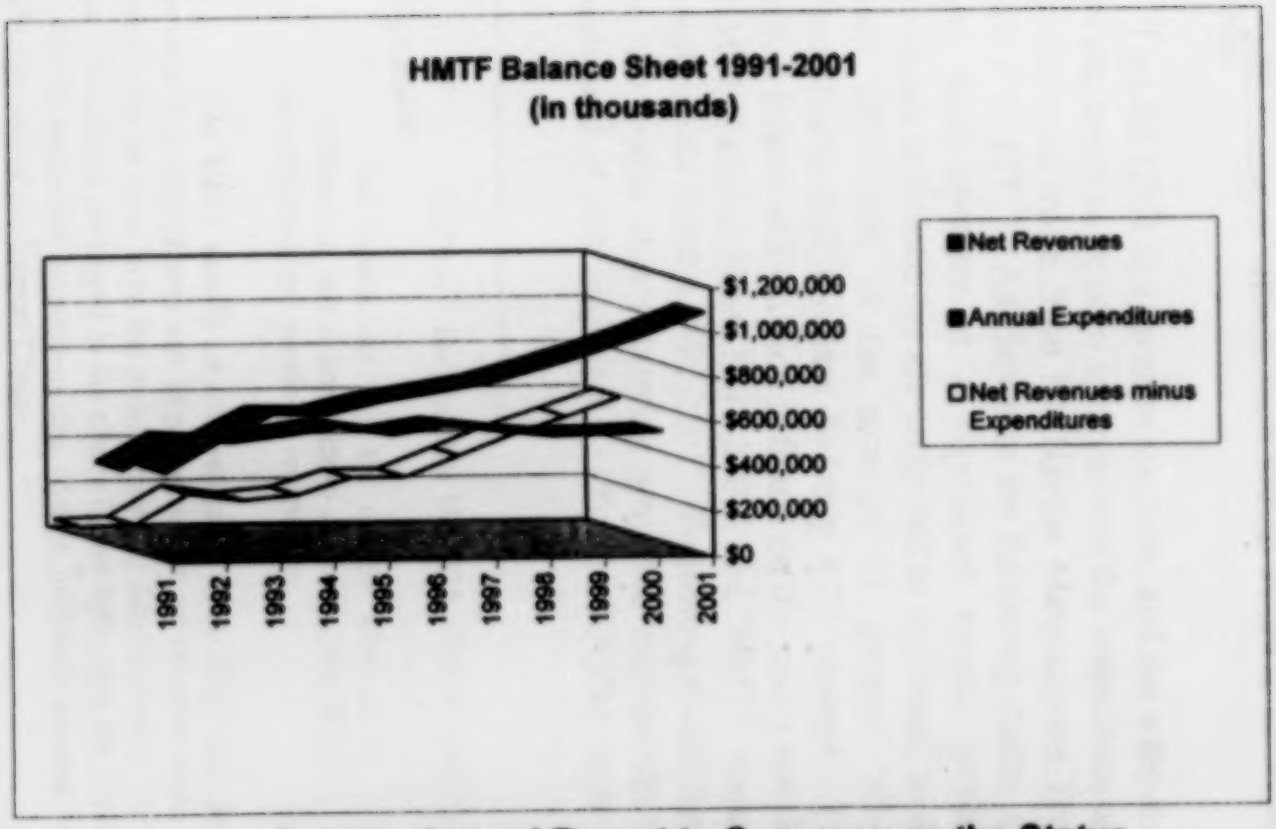
[5] In *Pace v. Burgess*, 181 U.S. 372, 375-76 (1876), the Court stated:

> . . . we cannot say that the charge imposed is excessive, or that it amounts to an infringement of the constitutional provision referred to.

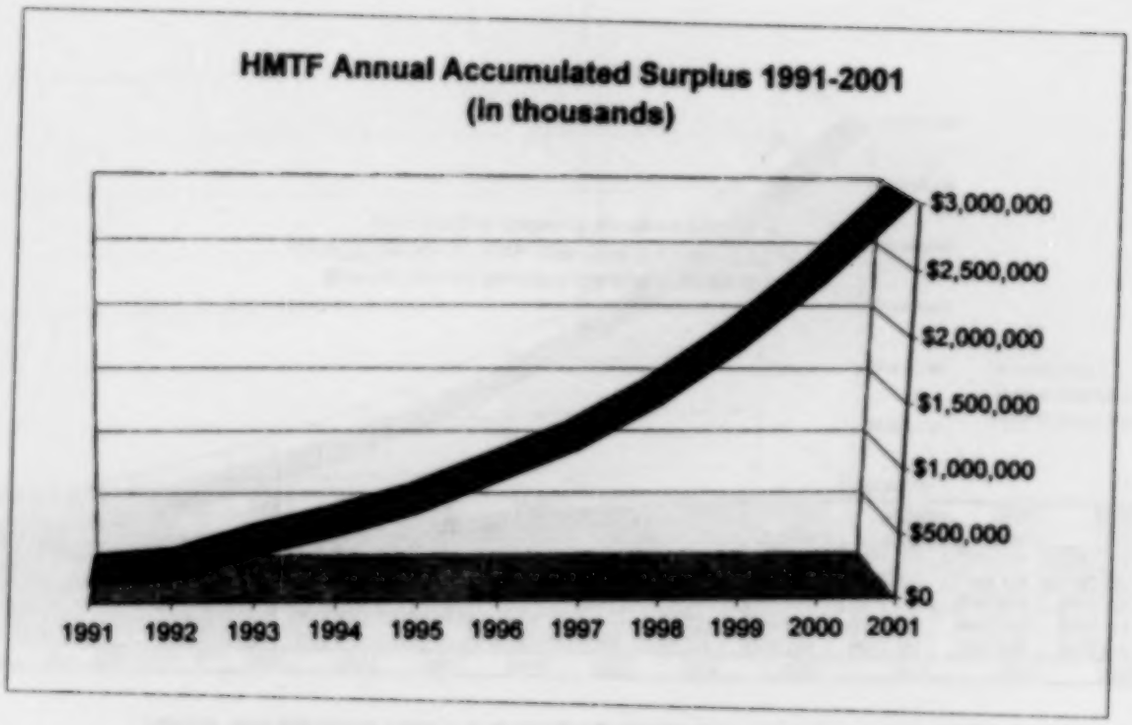
The HMT should be differentiated from the *Pace* charge because that charge was not imposed on an *ad valorem* basis. It should also be clear from the points raised by Respondent as well as the information portrayed in the charts found *infra*, that the HMT is in fact an excessive revenue-raising charge, and does amount to an infringement of the Export Clause.

[6] All 1991-2001 HMTF information is taken from the Annual Report, at 7-8.

increase. These charts demonstrate that the trust fund is seriously out of balance, and is heavily skewed toward increasing revenues, in the absence of any anticipated increases in future harbor maintenance expenditures.



Source: Annual Report to Congress on the Status of the HMTF for Fiscal Years 1995 and 1996, at 7-8.



Source: Annual Report to Congress on the Status of the HMTF for Fiscal Years 1995 and 1996, at 7-8.

Harbor Maintenance Trust Fund Balance Sheet 1991-2001 (in thousands)

	1991	1992	1993	1994	1995	1996	1997	1998	1999	2000	2001
Net Revenues	$395,501	$531,080	$650,722	$648,181	$700,891	$736,137	$776,191	$843,190	$912,788	$993,812	$1,085,419
Annual Expenditures	$352,960	$482,944	$498,376	$497,108	$531,082	$494,834	$632,686	$504,016	$480,878	$485,478	$494,578
Net Revenues minus Expenditures	$42,541	$48,136	$152,346	$149,085	$169,809	$244,303	$246,503	$339,174	$431,910	$508,134	$590,841
Beginning Balance	$30,254	$72,795	$120,931	$303,277	$451,385	$621,194	$865,497	$1,112,000	$1,451,174	$1,883,084	$2,391,218
Annual Carry-over Surplus	$72,795	$120,931	$303,277	$452,362	$621,194	$865,497	$1,112,000	$1,451,174	$1,883,084	$2,391,218	$2,982,059
Revenues as Percent of Expenditures	111%	109%	129%	123%	124%	133%	132%	140%	147%	151%	154%
Annual Surplus as Percent of Revenues	16%	25%	47%	70%	89%	117%	143%	172%	206%	241%	275%

Source: Annual Report to Congress on the Status of HMTF for Fiscal Years 1995 1996 (July 16, 1997), at 7-8; percentages derived from those figures.

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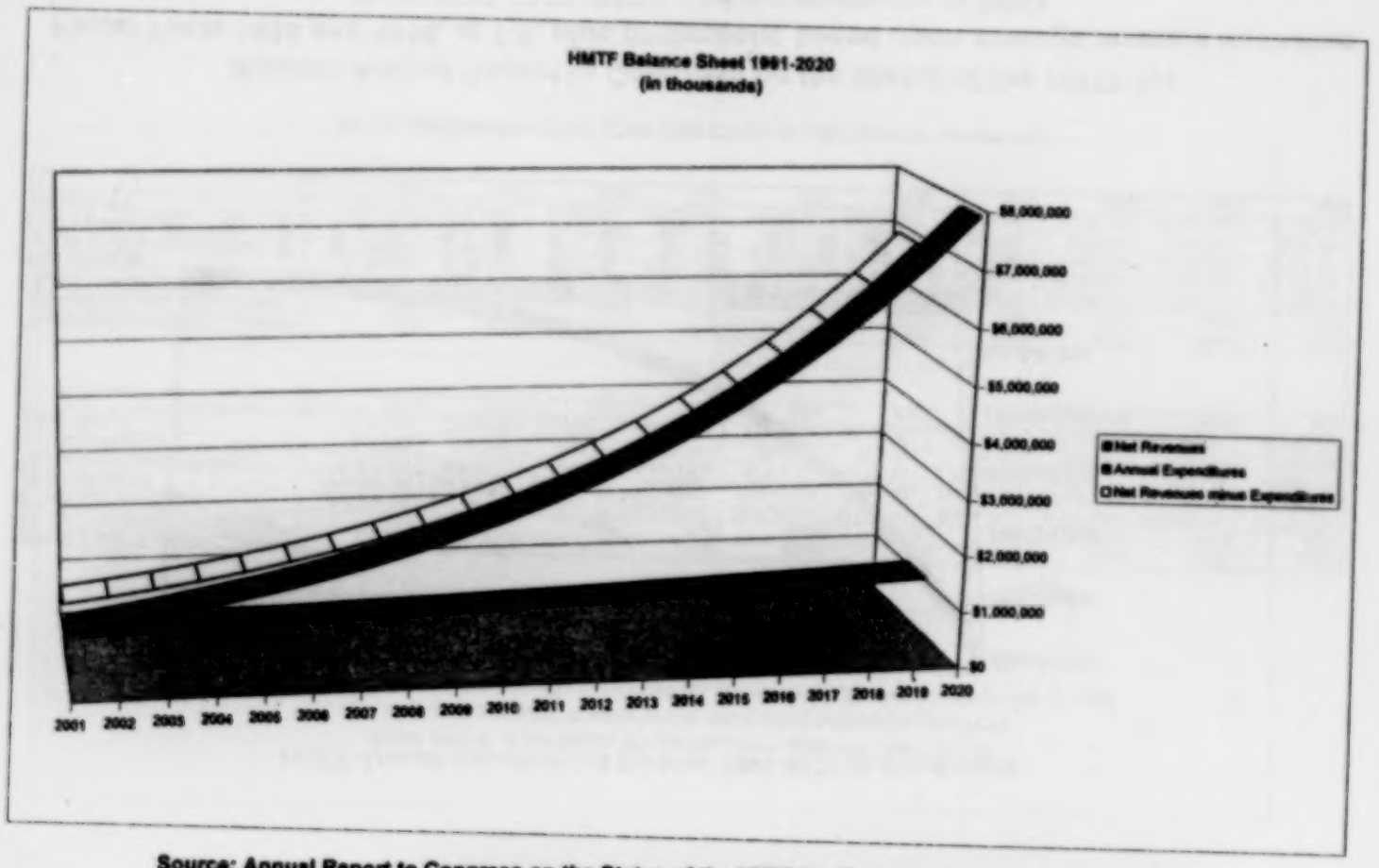

Source: Annual Report to Congress on the Status of the HMTF for Fiscal Years 1995 and 1996, at 7-8, plus projections based upon average revenue increases from 1991-2001 (11%), and expenditures (4.05%).

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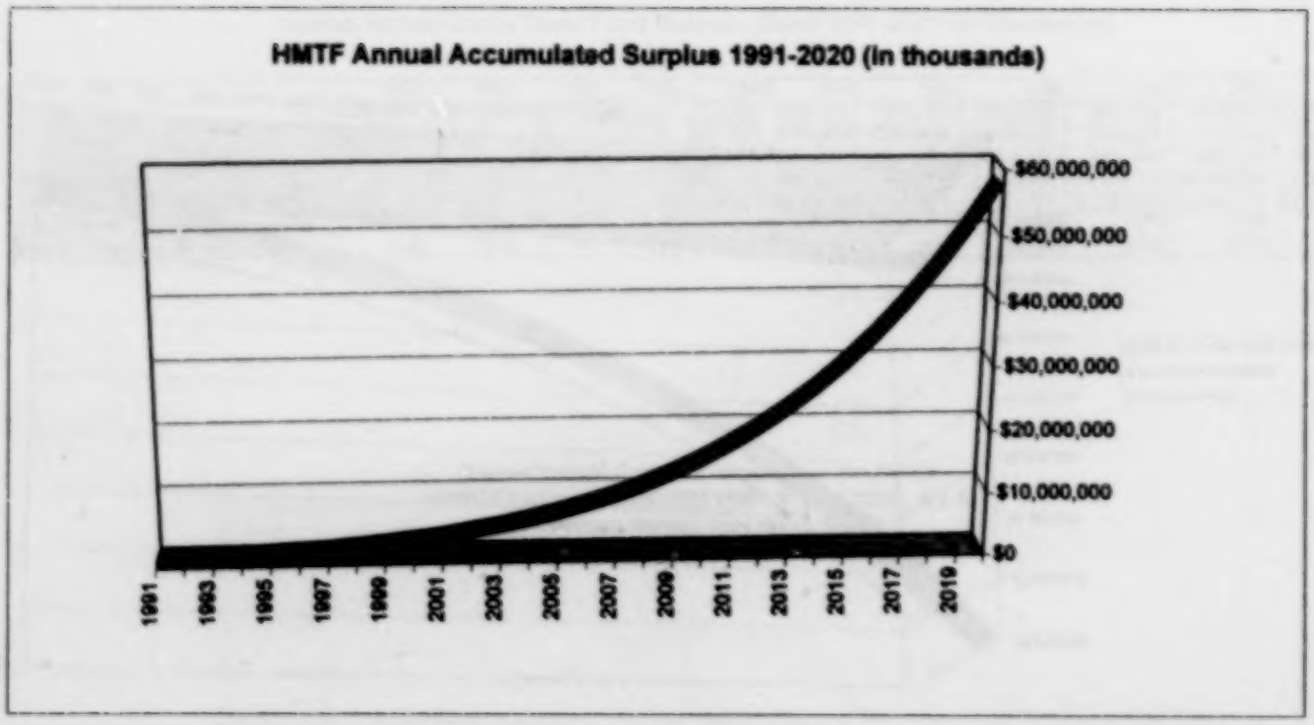

Source: Annual Report to Congress on the Status of the HMTF for Fiscal Years 1995 and 1996, at 7-8, plus projections based upon average revenue increases from 1991-2001 (11%), and expenditures (4.05%).

Harbor Maintenance Trust Fund Balance Sheet 2001-2020 (in thousands)

	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
Net Revenues	$1,085,419	$1,204,831	$1,337,381	$1,484,512	$1,647,931	$1,829,117	$2,030,340	$2,253,710	$2,501,057	$2,776,676
Annual Expenditures	$494,578	$514,589	$536,410	$557,574	$579,814	$603,098	$627,487	$652,955	$679,270	$706,794
Net Revenues minus Expenditures	$590,841	$690,242	$801,970	$927,438	$1,068,117	$1,226,051	$1,402,869	$1,600,689	$1,822,387	$2,070,122
Beginning Balance	$2,391,218	$2,982,059	$3,672,301	$4,474,271	$5,401,710	$6,469,827	$7,695,878	$9,098,747	$10,699,436	$12,522,104
Annual Carry-over Surplus	$2,982,059	$3,672,301	$4,474,271	$5,401,710	$6,469,827	$7,695,878	$9,098,747	$10,699,436	$12,522,104	$14,592,226
Revenues as Percent of Expenditures	154%	157%	160%	162%	165%	167%	169%	171%	173%	179%
Annual Surplus as Percent of Revenues	275%	309%	339%	384%	393%	421%	448%	479%	501%	529%

	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020
Net Revenues	$3,082,374	$3,421,481	$3,797,868	$4,215,719	$4,679,511	$5,194,327	$5,765,760	$6,400,191	$7,104,200	$7,885,776
Annual Expenditures	$736,361	$766,194	$798,091	$830,271	$863,764	$898,653	$932,932	$970,880	$1,009,998	$1,050,819
Net Revenues minus Expenditures	$2,347,023	$2,655,377	$3,001,834	$3,387,449	$3,817,727	$4,297,674	$4,832,848	$5,429,421	$6,094,202	$6,834,957
Beginning Balance	$14,592,226	$16,939,250	$19,595,627	$22,597,461	$25,984,909	$29,802,637	$34,100,311	$38,933,159	$44,362,580	$50,456,832
Annual Carry-over Surplus	$16,939,250	$19,595,627	$22,597,461	$25,984,909	$29,802,637	$34,100,311	$38,933,159	$44,362,580	$50,456,832	$57,291,789
Revenues as Percent of Expenditures	176%	178%	179%	180%	182%	183%	184%	186%	189%	187%
Annual Surplus as Percent of Revenues	550%	573%	595%	616%	637%	659%	679%	693%	710%	727%

Source: Projections from average increases for revenues (11%) and expenditures (4.05%) for period 1991-2001, as reported in the Annual Report to Congress of the Status of the HMTF for Fiscal Years 1995 and 1996, at 7-8.

CONCLUSION

Because the HMT is an *ad valorem* tax imposed upon exported cargo, it falls squarely within the prohibition of the Export Clause. The Framers understood that imposition of any such tax would lead to inevitable pressure for an increase in the tax rate. They also understood that exports should be promoted by government, not discouraged by taxation. We believe that the Framers would reject the HMT as soundly as they rejected the then-current export taxes imposed by many states before the enactment of the Constitution, and that this Honorable Court should do the same.

Respectfully submitted,

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Dated: January 14, 1998

(18)

JAN 15 1998

No. 97-372

In The Supreme Court of the United States

OCTOBER TERM, 1997

UNITED STATES OF AMERICA,

Petitioner,

v.

UNITED STATES SHOE CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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BRIEF OF AMICI CURIAE GENERAL CHEMICAL CORP., ET AL. IN SUPPORT OF RESPONDENT

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BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the direct, *ad valorem* taxation of exports by the Harbor Maintenance Tax (26 U.S.C. 4461(a)) violates the Export Clause of the Constitution under the holding of this Court in *United States v. International Business Machines Corp.*, 517 U.S. 843 (1996).

PARTIES TO THE PROCEEDINGS

Counsel for *amici curiae* named in paragraph 1 below, appear with the written consent of the parties and certify the following:

1. The full name of every *amicus* represented by this brief is: General Chemical Corp., Sumitomo Corp. of America, Newell International, Siemens Energy & Automation, Inc., Siemens Power Corp., Siemens Medical Systems, Inc., Siemens Transportation Systems, Inc., Siemens Solar Industries, Unisys Corp., Becton Dickinson and Co., Dart Container Corp. of Michigan, Capital-Mercury Shirt Corp., Joytex Co. &/or Lissabelle Co., Konica Imaging U.S.A., Inc., Konica Manufacturing, U.S.A., Inc., Kraft Foods Inc., Minolta Corp., Oscar Mayer Foods Corp., State Insulation Corp., Tarrab Export Co., Inc., The Standard Tallow Corp., Union Underwear Co., Inc., and Warner-Lambert Corp.

2. The names listed in paragraph 1 are the real parties in interest.

3. The parent company of the Siemens companies listed in paragraph 1 which has publicly traded shares issued to the public is Siemens A.G. of Germany, the parent company of the Konica companies listed in paragraph 1 above which has publicly traded shares issued to the public is Konica Corporation of Japan; the parent company of Sumitomo Corp. of America which has publicly traded shares issued to the public is Sumitomo Corporation of Japan; the parent company of Kraft Foods Inc., which has publicly traded shares issued to the public is Philip Morris Companies, Inc.; the parent company of Minolta Corp. which has publicly traded shares issued to the public is Minolta Co., Ltd. of Japan; the

parent company of Newell International which has publicly traded shares issued to the public is The Newell Co.; the parent company of Oscar Mayer Foods Corp. which has publicly traded shares issued to the public is Philip Morris Companies, Inc.

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In the Supreme Court of the United States

October Term, 1997

No. 97-372

United States of America, Petitioner

v.

United States Shoe Corporation, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF *AMICI CURIAE* GENERAL CHEMICAL CORP., ET AL. IN SUPPORT OF RESPONDENT[1]

INTEREST OF *AMICI CURIAE*

Amici curiae are exporters of a wide range of products from the United States to countries abroad. Their exports contribute to the United States balance of trade. The imposition of the Harbor Maintenance Tax on their exports places them at a competitive disadvantage in world markets. They believe that the imposition of this tax

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[1] This brief was authored in whole by the undersigned counsel of record and no party other than the named *amici curiae* has made a monetary contribution to its preparation or submission.

on their exports is unconstitutional under Article I, Section 9, Clause 5 of the United States Constitution.

STATEMENT OF THE CASE

The Harbor Maintenance Tax (26 U.S.C. 4461) imposes a direct, *ad valorem* tax on exports from the United States. The tax is not imposed on vessels using the ports, and no tax is imposed in the case of vessels using the port which do not contain cargo.

Amici curiae otherwise adopt the Statement of the Case by respondent, United States Shoe Corporation.

SUMMARY OF ARGUMENT

The Harbor Maintenance Tax (hereinafter: HMT), 26 U.S.C. 4461(a), is a direct, *ad valorem* tax on exports which violates Article I, Section 9, Clause 5 of the United States Constitution. The decision of this Court in *United States v. International Business Machines Corp.*, 517 U.S. 843 (1996), is dispositive and *stare decisis* of the issues presented in this case. Petitioner has ignored the decision of this Court in the *International Business Machines Corp.* case (hereinafter *IBM*) and has failed to meaningfully address the issues presented in this appeal. The decision of the United States Court of Appeals for the Federal Circuit which follows the decision in the *IBM* case and holds that the HMT violates the Export Clause of the Constitution should be affirmed.

ARGUMENT

Introduction

This Court has held that "the Export Clause of the Constitution [prohibits] the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit." *IBM*, 517 U.S. at 845. The court of appeals initially stayed the filing of briefs in this case with the unanimous agreement of the parties and the *amici* pending this Court's decision in the *IBM* case. In its petition for writ of certiorari in the *IBM* case, petitioner, United States, noted the significance of that case with respect to the "proper scope of the Export Clause" arguing that the case had "significance not only for the tax imposed [in the *IBM* case] but also for other nondiscriminatory federal taxes of general application." The example of such other taxes cited by petitioner was, of course, the HMT. Petition for Writ of Certiorari at 13-14, *United States v. International Business Machines Corp.*, Docket No. 95-591. Petitioner clearly recognized that the decision in the *IBM* case would have a major impact on the proper interpretation of the Export Clause and on the outcome of the HMT case. The court of appeals, respondent and the *amici* likewise recognized that the decision in the *IBM* case could be dispositive of the constitutional issues in this case. We respectfully submit that it was.

Even if there could be any possible doubt as to the unconstitutionality of the direct taxation of exports by the HMT in the wake of the *IBM* decision, it is absolutely astounding that petitioner could file a 31 page brief and not even cite or mention, much less analyze, the impact of the *IBM* case. Certainly, the *IBM* case now stands as the leading and the only case

in the modern history of the Court to squarely consider the scope of the Export Clause of the Constitution. One would assume that a party petitioning from a decision of a court of appeals, which relied upon a decision of this Court as controlling on the issue, would address that decision. Indeed, even a first year law student would recognize that a brief which did not cite, analyze and attempt to distinguish such an adverse precedent would receive a failing grade.

We respectfully submit, however, that this is not merely an issue of poor brief writing. Failure to address the *IBM* case is part of a continuing strategy by petitioner after this Court's decision in *IBM* to distract both the court of appeals and this Court from the fundamental issues of the case by focusing on the Commerce Clause and the Import-Export Clause and not on the Export Clause. The strategy is to avoid having an adversarial dialogue with respondent and *amici* on the *IBM* case by failing to cite it in its brief on the merits and most likely confining discussion of *IBM* to a cursory dismissal of its relevance in a reply brief. This strategy was begun in the court of appeals where the *IBM* case was not mentioned by the government until page 48 of a 50 page brief and then analyzed in the reply brief. The pattern continued in the petition for a writ of certiorari which also did not mention the *IBM* case. The only discussion of the case is in a summary dismissal of its relevance on pages 1-3 of the reply to respondent's brief in opposition to the petition for a writ of certiorari. In view of this total failure to deal meaningfully with the *IBM* case, which is of such obvious moment to the case at bar, we respectfully

submit that the Court would be totally justified in disregarding the entire brief filed by the petitioner.[2]

The undersigned *amici* have participated at all stages of this case before the United States Court of International Trade and the court of appeals and have fully supported the briefs, other papers, and oral arguments made by respondent. As we anticipate that the same arguments will be made in the final version of the brief which respondent will file in this Court, we will not burden the Court with a point by point repetition of those arguments, but will adopt them and incorporate them by reference herein. Rather, in compliance with Supreme Court Rule 37, we will attempt to assist the Court by amplifying certain key points and adding factual and legal perspectives to those already advanced by respondent and other *amici*. In this way, we hope that we will meaningfully assist the Court in analyzing the issues in this case and at the same time advance the cause of those parties on whose behalf we appear as *amici curiae*.

THE HMT VIOLATES ARTICLE I, SECTION 9, CLAUSE 5 OF THE CONSTITUTION WHICH PROVIDES THAT NO TAX OR DUTY SHALL BE LAID ON ARTICLES EXPORTED FROM ANY STATE

The HMT is explicitly a tax and duty on cargo since under 26 U.S.C. 4462(a)(1)(A) liability for the HMT arises from the act of "loading of commercial

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[2] We note that the brief filed by the State of Oregon as *amicus curiae* in support of petitioner similarly fails to cite or discuss the decision in the *IBM* case. For that reason, we will not address the irrelevant issues raised in that brief.

cargo on . . . a commercial vessel at a port," and as it applies to exports is a tax upon the exportation of that cargo in violation of Article I, Section 9, Clause 5 of the Constitution.

Inasmuch as the HMT is a federal tax levied on exported cargo, even if found to be non-discriminatory, the assertions of the government as to its constitutionality were expressly rejected by this Court's decision in *IBM*, in which a tax levied on insurance premiums that covered export shipments of goods was reviewed. The Court held as follows in *IBM*, 517 U.S. at 845:

> We resolve in this case whether the Export Clause of the Constitution permits the imposition of a generally applicable, nondiscriminatory federal tax on goods in export transit. We hold that it does not.

In *IBM*, the Court refused to overrule its early precedents and emphasized that meaningful textual differences that exist between clauses of the Constitution should not be overlooked and that the "common and usually expansive meaning" of the word "tax" should not be ignored. 517 U.S. at 857-858. The Court further dismissed the same arguments now being presented by the government in this case which rely on cases involving the Commerce and Import-Export Clauses.

The *IBM* decision adopts in essence the interpretation of the Export Clause found in precedents of this Court. In so doing, this Court reaffirmed the validity of those precedents. Significantly these same precedents along with the *IBM* decision were relied upon by the court of appeals in this case. The

government's attempts to continue to rely on utterly distinguishable precedents simply ignores the *IBM* case. For the reasons suggested at the outset of this brief, the entire argument in the petitioner's brief should be summarily rejected.

The court of appeals properly followed the decision in the *IBM* case and the principles of the cases cited therein. What petitioner has done is to completely ignore the *IBM* decision in the hope that the Court will somehow merge the principles in cases interpreting the Commerce Clause and the Import-Export clause into the Export Clause despite the refusal of the Court to do so in the *IBM* case. What the *IBM* case stands for is the proposition that the Export Clause prohibits a tax on exports and if the HMT is a tax on exports, which by its very terms it is, the considerations in the cases cited by petitioner are never reached. The total bankruptcy of the government's case is exposed by its complete failure to meaningfully deal with the *IBM* decision.

Because the HMT by its terms is a tax and duty specifically applied to the *ad valorem* content of exports, it violates the express terms of Article I, Section 9, Clause 5 of the United States Constitution, and for this reason is unconstitutional and void. *Amici* respectfully submit that the United States Court of International Trade was correct in determining that (Pet. App. 66a):

> As a tax imposed upon delivery of cargo to a carrier violates the Export Clause, *see A.G. Spalding*, 262 U.S. at 68-70, 43 S.Ct. at 485-86, a tax imposed on the further step of loading such cargo onto the

> vessel also falls within the prohibition of the Clause.

The court of appeals affirmed the reliance of the United States Court of International Trade on *A.G. Spalding* and rejected the government's argument that the HMT was somehow not a tax on exports because it is a user fee. (Pet. App. 23a-24a.)

It is uncontested by the government that loading of cargo on a vessel for export encompasses the ultimate act of exportation. Courts have long held that a tax cannot be levied on export cargo, *Fairbank v. United States*, 181 U.S. 283, 290 (1901), nor can it be levied on the act of exportation. *United States v. Hvoslef*, 237 U.S. 1 (1915). The predecessor of the Court of Appeals for the Federal Circuit, the Court of Customs and Patent Appeals, held in a case involving the dutiability of charges incurred in connection with the loading of cargo on a vessel that those charges were non-dutiable since they "accrue necessarily and directly as a result of exportation." *Kurt Orban Co., Inc. v. United States*, 577 F.2d 1125, 1130 (CCPA 1978). The movement of cargo *"to shipboard is consistent only with exportation."* *Ibid.* (emphasis in original). Therefore, by levying the tax in direct proportion to the cargo's value, Congress could not have imposed a tax any closer to exportation or more directly on exports.

Indeed, it is inescapable that under the *IBM* decision, the HMT violates the Export Clause of the Constitution as a direct tax on exports. We note that petitioner cannot even find support in the dissenting opinion in *IBM* for its position that the HMT does not violate the Export Clause. The dissenting opinion recognized the constitutional prohibition in the Export Clause of any direct tax on

exports. It merely took issue with the majority because it did not believe the tax on insurance premiums was the equivalent of "a proxy for taxing the goods . . . ." 517 U.S. at 864. However, there was no dispute with the majority regarding the fact that the Export Clause prohibits "what its text says: any federal tax laid on Articles exported, U.S. Const. Art. I § 9, cl. 5." *Id.* at 868.

The government has failed to meaningfully address the issue that the HMT by its very terms is a tax on exports. There was no argument by the government that the indirect tax in the *IBM* case was not a tax on exports, and it certainly cannot argue that the *ad valorem* tax on exports in this case is not a direct tax on exports. The majority in the *IBM* case after concluding that the Export Clause "does not permit assessment of nondiscriminatory taxes on goods in export transit," noted at 517 U.S. at 863:

> Reexamination of the question of whether a particular assessment on an activity or service is so closely connected to the goods as to amount to a tax on the goods themselves must await another day.

That day has yet to come. A more direct tax on exports and the act of exportation than the HMT cannot be envisaged.

In *IBM* the court was careful to distinguish permissible federal taxation of pre-export goods and services from a prohibited "tax or duty, discriminatory or not, that falls on exports during the course of exportation." 517 U.S. at 848. The HMT is not levied on pre-export goods or services, it is a classic example of a direct tax on exports in the

act of exportation. Under the Customs Regulations, 19 C.F.R. 24.24 (1995), the exporter becomes "liable" when the cargo is loaded on the vessel "for export." In short, the tax accrues when the cargo becomes an export.

The government contends that the HMT is not a tax upon exports in violation of the Export Clause but merely a user fee. As the United States Court of International Trade noted in its opinion in this case (Pet. App. 53a):

> Although Congress can adopt the methods it deems necessary to accomplish its goals pursuant to the regulation of commerce, this authority is limited by other provisions of the Constitution. *United States v. Lopez*, ___U.S.____, ____, 115 S.Ct. 1624, 1627, 131 L. Ed. 2d 626 (1995) (providing that commerce power "is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution") (citations omitted).

This is not the first time that Congress has passed an unconstitutional tax on exports and, it would thus appear, it will not be the last time. In *IBM*, the Court unequivocally stated:

> The text of the Export Clause . . . expressly prohibits Congress from laying any tax or duty on exports . . . . [S]hifts in the Court's view of the scope of the dormant Commerce Clause should not, and indeed cannot, govern our interpretation of the Export Clause.

IBM, 517 U.S. at 852.

Specifically addressing taxation and duties on exports, this position was strongly reaffirmed in *IBM* where the Court cited to *Fairbank v. United States*, 181 U.S. at 290:

> The requirement of the Constitution is that exports should be free from any governmental burden. The language is "no tax or duty." Whether such provision is or is not wise is a question of policy with which the Courts have nothing to do. We know historically that it was one of the compromises which entered into and made possible the adoption of the Constitution. It is a restriction on the power of Congress.

IBM, 517 U.S. at 848.

Petitioner has taken great pains to raise issues which are not relevant to the constitutional issue before the Court. The issue in this case is not whether the harbors of this country need dredging. They do. The issue is not who should pay for the dredging of the harbors or how it should be funded. That is for Congress to decide. The issue is whether a constitutionally permissible tax has been enacted. It has not. The *IBM* case stands squarely for the proposition that a direct tax on exports is not permitted under the Export Clause. There are patently simple alternatives to the HMT which could easily pass constitutional muster and not violate the Export

Clause. It is obviously for Congress, and not the courts, to choose among these many viable alternatives, a number of which involve political considerations.

If the tax was truly a user fee which could pass constitutional muster, at the very minimum, it would have to be imposed on the vessels using the port and not on the value of the cargo on those vessels. The government is claiming that the fees collected are to be used for the purpose of maintaining and developing American ports and harbors for all uses, commercial and recreational. If these fees were used as purported by the government to help defray the cost for the construction, maintenance and operation of channels and harbors, at the very least, the tax would have to bear some reasonable relationship to the actual use of the ports and harbors by all vessels and vessel operators. A valid user fee would apply to all vessels, whether cargo or non-cargo vessels, and would apply whether they were full or empty.

Instead, the tax is imposed at the very point where the act of exportation occurs, on the value of the cargo and with no reasonable relationship to the use of the ports by the vessels. For example, the tax on a handful of diamonds loaded on a vessel would undoubtedly exceed the tax on a container load of salt, demonstrating that the HMT is not a user fee because the amount of the tax collected has nothing to do with the use of the harbor by a vessel and is not even remotely connected or commensurate with the use of the harbors.

The conclusion that the HMT is unconstitutional under numerous Supreme Court cases, some of which were cited herein, is further supported by reference to the legislative history of the Water Resources Development ("Act"). The Committee

Hearings indicate that Members of Congress and their committee staffs recognized the unconstitutionality of the provision. The legislative history of the Act will undoubtedly be set forth in respondent's brief and there is little purpose in burdening the Court by repeating it.

However, there can be little doubt that Congress was fully aware that it was enacting an unconstitutional tax insofar as the HMT applied to exports. Though Congress characterized the HMT as a user fee it recognized that it was prudent to make the export tax provision separable from the rest of the bill so as to avoid having a successful constitutional challenge to the export tax undermine the entire bill. To say the least, the actions of Congress in denominating the HMT a tax on port use under 26 U.S.C. 4461(a) were disingenuous. Clearly Congress has imposed "a duty under the pretext of fixing a fee," *Pace v. Burgess*, 92 U.S. 372, 376 (1876), leaving to the Courts the unpleasant task of declaring the law unconstitutional. In the words of the Chairman of the House Committee on Merchant Marine and Fisheries, a "tax by any other name remains a tax." H.R. Rep. No. 251 (IV) 99th Cong., 1st Sess. 23, 41 (1985). As noted by the Chairman, the "research performed by and at the Committee's request, only strengthens my convictions in this regard." *Ibid.*

Since the tax on the value of the cargo has nothing to do with the use of the harbors by the vessel and is not even remotely connected with imposing the tax in an amount commensurate with that use, in the case at bar, "the text of the constitutional provision provides a better decisional guide than that offered by the Government." *IBM*, 517 U.S. at 860. Hence, the "better reading, that adopted by our earlier cases, is

that the Framers sought to alleviate their concerns by completely denying to Congress the power to tax exports at all." *Ibid.*

In striking down the non-direct fee on exports in *IBM*, 517 U.S. at 855 n.3, the Court emphasized that

> In *Fairbank*, *Hvoslef*, and *Thames & Mersey*, we struck down taxes that were *not assessed directly on goods in export transit*, but which the Court found to be so closely related as to be effectively a tax on the goods themselves (emphasis added).

The HMT is far more than the equivalent of a tax on exports; by its clear and unmistakable terms, it is a direct tax and duty on the export cargo. If indirect taxes in *Fairbank, Hvoslef, Thames & Mersey and IBM* were unconstitutional, a direct tax such as the HMT certainly is.

In view of the construction given by the Court to the Export Clause, which led to invalidation of non-direct taxes on exported merchandise on constitutional grounds in a long line of cases culminating with the *IBM* case, this Court should have little difficulty in determining the unconstitutionality of the direct taxation of exports by the HMT. The decision in *IBM* is *stare decisis* of the real issues, if any, which remain in this case. The principle of *stare decisis* should be followed in this case for the same reasons that it was followed in *IBM*, 517 U.S. at 856.

Therefore, we respectfully submit that the Court should affirm the findings of the court of appeals that the HMT, as it applies to exports, constitutes a tax prohibited by the Export Clause.

CONCLUSION

We respectfully submit that the court of appeals was correct in holding that the HMT, as it applies to exports, is an impermissible tax and duty on exports in violation of Article I, Section 9, Clause 5 of the Constitution. The correctness of that decision is underscored by the holding of this Court in *IBM*. For all of these reasons, the decision of the court of appeals should be affirmed.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Export Clause of the United States Constitution precludes the application of a federal ad valorem tax, known as the Harbor Maintenance Tax (26 U.S.C. § 4461), on articles to be exported from United States' ports.

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INTEREST OF AMICUS CURIAE

Founded in 1907, The National Industrial Transportation League ("the League") is a voluntary organization of over 1,000 shippers, and groups and associations of shippers, that conduct industrial and/or commercial enterprises of all sizes throughout the United States and, in a number of cases, in locations overseas. The League is the oldest and the largest nationwide organization representing shippers that move all kinds of commodities, via all modes of carriage, across interstate, intrastate and international boundaries. Accordingly, the League's membership is comprised of United States importers and exporters. As such, many League members pay the Harbor Maintenance Tax ("HMT"), 26 U.S.C. § 4461 (1997), on exported commodities.[1]

A number of League members have filed claims in either the United States Court of International Trade ("CIT") or the United States Court of Federal Claims ("CFC") seeking refunds of the money paid by them under the HMT, as applied to exports. All refund cases have been stayed in either the CIT or the CFC pending resolution of this case by the Court. Accordingly, a number of League members are similarly situated to the respondent United States Shoe Corporation, and therefore

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[1] Pursuant to Supreme Court Rule 37.6, counsel of record and additional named counsel for Amicus Curiae wholly authored the instant brief. The expense of preparation was solely incurred by The National Industrial Transportation League. The League has received the consent of Petitioner and Respondent for the filing of this brief in support of Respondent.

maintain a direct and substantial interest in this case. The League also participated as an amicus curiae in the proceeding before the Court of Appeals for the Federal Circuit.

The League's membership is also vitally concerned with the impact of the HMT on the competitiveness of United States products exported overseas. In today's global economy, the manufacturers that comprise the League's membership are increasingly required to compete not only at home but also abroad. By taxing exports, the HMT increases the cost of exporting goods, substantially so for higher-valued commodities, thereby reducing the competitiveness of American products.

The HMT has further harmed the United States' economy and ports, because a number of shippers have sought to avoid this substantial burden on exportation by diverting their cargo to Canadian ports. Canada Cargo Diversions Cuts Both Ways, AMERICAN SHIPPER, Oct. 1994, at 78.[2] The reduction of cargo shipped through United States ports has been particularly acute in the Northeast, Great Lakes and Pacific Northwest regions.[3] For

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2 See also Harbor Tax Rollback Proposed In Bill Introduced In House, INSIDE DOT & TRANSPORTATION WEEK, Mar. 24, 1995, where it was reported that "the tripling of the HMT in January 1991 pushed shipping costs for companies moving high-value consignments such as photographic equipment or machinery by as much as 25 percent, forcing many local companies to divert their shipments through Canadian terminals, primarily located at the Port of Montreal."

3 See note 1.

example, in 1992 it was reported that "the Port of Boston. . . is losing between 10,000 and 15,000 forty-foot containers of cargo to Canadian ports yearly because of the tax." Push for Harbor Tax Rollback: New England Port/Shipper Coalition; Ports, AMERICAN SHIPPER, Nov. 1992, at 85. Recent trade reports reveal that the amount of cargo being diverted to Canada from the United States is growing, and that avoidance of the HMT is one of the primary reasons for the diversion. Canadian Ports Gain in Transatlantic, AMERICAN SHIPPER, Mar. 1997, at 66 (reporting that in 1995, the Port of New York/New Jersey lost 100,000 containers of cargo to Canada). Because many shippers must ship to and from American ports, they have a substantial interest in ensuring that U.S. ports remain competitive.

Accordingly, ensuring that the HMT does not unlawfully burden the competitiveness of American exports, and the nation's economy, is of vital importance to the League.

STATEMENT OF THE CASE

The League adopts the Statement of the Case set forth in the Brief for the Respondent in Opposition to the United States' Petition for a Writ of Certiorari, filed by United States Shoe Corporation. Respondent's Brief in Opposition at 3-8.

SUMMARY OF ARGUMENT

The HMT, as applied to articles exported from United States ports, is an unlawful tax that violates both the letter and spirit of the Export Clause. U.S. Const., art. I, § 9, cl. 5. This Court has consistently followed the intent of the Framers in broadly

construing the Export Clause and in declaring legislation unlawful that directly or even indirectly burdens exportation. The HMT is an ad valorem tax that is assessed directly against the value of the cargo to be exported and, thus, it places a direct burden upon exportation. The primary purpose of the HMT is to raise revenue for the Federal Government rather than to compensate the Government for benefits supplied.

The HMT is not a valid user fee. It fails at least two elements of the three part test articulated in Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972) and refined in Massachusetts v. United States, 435 U.S. 444 (1978), for determining whether an assessment is a valid user fee. Specifically, the HMT does not represent a "fair approximation of the cost of the benefits supplied" (Massachusetts, 435 U.S. at 463, n. 19) because there is no rational relationship between the cost of harbor maintenance and the value of articles exported. The HMT is unfairly assessed only against the exporter, an indirect beneficiary, rather than all port users, including the primary beneficiaries of port maintenance, such as the vessel owners and the ports themselves. Moreover, the HMT has repeatedly resulted in substantial surpluses which establishes an overt disconnect between the HMT liability of the exporter and the costs of the benefits received.

ARGUMENT

I. THE EXPORT CLAUSE HAS BEEN AND SHOULD BE BROADLY CONSTRUED AND STRICTLY ENFORCED

The Export Clause simply states: "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const., art. I, § 9, cl. 5. As this Court recently observed, this plain and direct prohibition on the taxing power of the government has been broadly construed and strictly enforced. United States v. International Bus. Mach. Corp., 517 U.S. 843, 135 L. Ed. 2d 124 (1996) ("IBM"). The words, history and purpose of the Export Clause establish that the Framers intended that the application of the Export Clause should be expansive, rather than narrow. This Court has repeatedly adhered to the Framers' purpose in evaluating the validity of federal assessments applied directly or even indirectly to U.S. exports. Following this Court's precedent and the Framers' intent, the lower courts in this case correctly determined that the HMT, which places an ad valorem levy against articles moving in the United States foreign commerce (26 U.S.C. § 4461(b)), is an unconstitutional tax as applied to exports. The Government has not offered any compelling legal basis for this Court to alter its consistently broad application and strict enforcement of the Export Clause. Thus, the decision of the Federal Circuit should be affirmed.

A. The Words and History of the Export Clause Require That It Be Broadly Construed

The evidence surrounding the drafting of the Export Clause establishes that the Framers of the U.S. Constitution recognized that unburdened trade of American products was vitally important to the prosperity of the United States. The Export Clause, which sought to address the concern that the taxation of exports would result in discrimination between the States and would hinder the competitiveness of such goods abroad,[4] has assisted in leading the United States to become one the world's largest and most successful economies. The Framers' intent to foster trade continues to have enormous application today, as the United States develops as a world leader in the evolving global economy.

The intent of the Framers in establishing the Export Clause was to ensure that "the process of exporting the products of a State, the goods, chattels, and property of the people of the several States, should not be obstructed or hindered by any burden of taxation." United States v. Hvoslef, 237 U.S. 1, 13 (1915) ("Hvoslef"), citing Miller on the Constitution, p. 592. The records of the Constitutional Convention reveal that the Export Clause was initially proposed by delegates from Southern states who feared that a Congress largely controlled by the Northern states would result in trade-barring taxation on their highly competitive export articles of tobacco, cotton, indigo and rice. IBM, 135 L. Ed. 2d at 139, citing 2 M.

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4 2 M. Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, p. 363 (1937) (statements by Mr. Clymer).

Farrand, THE RECORDS OF THE FEDERAL CONVENTION OF 1787, pp. 95, 305-308, 359-363 (rev. ed. 1966). These fears were also shared by delegates representing the Middle states of Pennsylvania and New Jersey who opposed the taxation of wheat to be exported to foreign markets. IBM, 135 L. Ed 2d at 148 (1996) (Kennedy, J., dissenting with Ginsburg, J.).

Assertions by the Government, both in the past and recently, that the fear of discrimination between States which led to the adoption of the Export Clause requires that this provision be narrowly construed have been rejected as contrary to the Framers' intent. The unvarnished command set forth in the words of the Export Clause is the first indicia of this broad intent. See Fairbank v. United States, 181 U.S. 283, 292-93 (1901) ("Fairbank") (the broad intent of the Clause is "obvious from the language of the clause itself."); IBM, 135 L. Ed. 2d at 139 ("While the original impetus may have had a narrow focus, the remedial provision that ultimately became the Export Clause does not, and there is substantial evidence from the Debates that proponents of the Clause fully intended the breadth of scope that is evident in the language.") (emphasis added).

The intent of the Framers that the Export Clause be broadly applied is also evidenced by a history which shows that two separate amendments proposed at the Constitutional Convention to limit the scope of the Clause were rejected by a majority of the delegates. United States Shoe Corp. v. United States, 907 F. Supp. 408, 413 (CIT 1995) ("U.S. Shoe"); Fairbank, 181 U.S. at 293. In Fairbank, a leading

Export Clause case, the Court described the purpose of the Clause in light of its history:

> the purpose of the restriction is that exportation, all exportation, shall be free from national burden. This intent . . . is reinforced by the fact that in the constitutional convention Mr. Clymer moved to insert after the word "duty" the words "for the purpose of revenue" but the motion was voted down. So it is clear that the framers of the Constitution intended not merely that exports should not be made a source of revenue to the National Government, but that the National Government should put nothing in the way of burden upon such exports. If all exports must be free from national tax or duty, such freedom requires not simply an omission of a tax upon the articles exported, but also a freedom from any tax which directly burdens the exportation . . . .

181 U.S. at 292. The other proposed amendment that would have permitted export taxes if approved by a two-thirds majority in both houses was also rejected. IBM, 135 L. Ed. 2d at 148 (Kennedy, J. dissenting with Ginsburg, J.), citing 2 M. Farrand, RECORDS OF THE FEDERAL CONVENTION OF 1787, at 363.[5]

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[5] The trade policy contemplated by the Framers, which would allow for discrimination against the products of other nations imported into the United States but not against U.S. goods exported to other nations, was further expressed by James

Accordingly, the Framers' purpose is clear: the export of U.S. articles was desired and recognized as a benefit to the American economy; this benefit was not to be burdened by taxation of any type, notwithstanding the Government's need for revenue. And so all governments—Federal and State—were barred from assessing taxes on exported articles. 2 JAMES MADISON, THE DEBATES IN THE FEDERAL CONVENTION OF 1787 WHICH FRAMED THE CONSTITUTION OF THE UNITED STATES OF AMERICA 410-12, 556-58 (Gaillard Hunt & James Scott Brown eds., 1987).

Madison of Virginia who on the floor of the First Congress stated: "'We possess natural advantages which no other nation does; we can, therefore, with justice, stipulate for a reciprocity in commerce. The way to obtain this is by discrimination.' Congress passed bills levying tonnage duties eight times higher on foreign vessels than on U.S. ships in American ports, and also imposed import taxes on foreign goods entering the country. Americans wanted freer trade, but they were prepared to play rough mercantilist trading games if necessary." Walter LaFeber, THE AMERICAN AGE: U.S. FOREIGN POLICY AT HOME AND ABROAD, 1750 TO PRESENT 45 (1994) (citing 3 IRVING BRANT, JAMES MADISON 246-54 (1944-1966)). See also THE FEDERALIST No. 4, at 98 (John Jay) (Isaac Kramnick ed., 1987). It was also well understood by the Framers that, in the competition for export markets, taxes were passed on to the consumer overseas, making American export articles relatively more expensive and less competitive. As Alexander Hamilton observed, "[i]mposts, excises, and, in general, all duties upon articles of consumption, may be compared to a fluid, which will in time find its level with the means of paying them." THE FEDERALIST NO. 21, at 176 (Alexander Hamilton) (Isaac Kramnick ed., 1987). To tax American exporters was to injure American comparative advantage. Compare THE FEDERALIST NO. 35, at 232 (Alexander Hamilton) (Isaac Kramnick ed., 1987) with THE FEDERALIST NO. 52, at 276 (James Madison) (Isaac Kramnick ed., 1987).

B. This Court Has Broadly Construed the Export Clause

The Framers' clear intent has been repeatedly honored in the decisions of this Court. The Court has adopted an expansive view of the taxation restriction, seeking to protect not only the letter but also the spirit of the Export Clause:

> The requirement of the Constitution is that exports should be free from any governmental burden. The language is "no tax or duty" . . . . It is a restriction on the power of the Congress . . . [that] should be enforced in accordance with its letter and its spirit, and no legislation can be tolerated which, although it may not conflict with the letter, destroys the spirit and purpose of the restriction imposed.

Fairbank, 181 U.S. at 290 (emphasis added) (federal stamp tax imposed on export bills of lading unconstitutional). Accordingly, this Court has declared unconstitutional not only legislation that places a direct assessment on the article to be exported but also legislation that burdens the process of exportation. In Hvoslef, supra, the Court invalidated a tax applied to maritime charter parties, finding that the constitutional freedom from taxes provided to exported articles,

> plainly involves more than mere exemption from taxes or duties which are laid specifically upon the goods themselves. If it meant no more than

> that, the obstructions to exportation which it was the purpose to prevent could readily be set up by legislation nominally conforming to the constitutional restriction but in effect overriding it.

237 U.S. at 13. The Court's most recent Export Clause case, IBM, decided less than two years ago, reaffirmed the Court's prior decisions and the long-standing broad construction of the Export Clause. In IBM, the Court re-established that "our cases have broadly exempted from federal taxation not only export goods, but also services and activities closely related to the export process." IBM, 135 L. Ed. 2d at 130. The Court further confirmed its prior holding that "the Export Clause strictly prohibits any tax or duty, discriminatory or not, that fall on exports during the course of exportation." Id. at 132-33, citing Fairbank, Hvoslef, and Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19 (1915).

Against this backdrop, the HMT cannot be permitted to stand. As both the CIT and the Court of Appeals determined, the HMT is not simply a fee for port use as contended by the Government but a direct and substantial tax burden on articles exported from U.S. ports.

II. THE HARBOR MAINTENANCE TAX IS A TAX

The HMT is a "tax" designed to raise revenue for the Federal Government. The very name of the statute established by Congress designates the assessment as the "Harbor Maintenance Tax." The provisions of the statute also repeatedly describe the

assessment as a tax. 26 U.S.C. § 4461(a) ("There is hereby imposed a tax on any port use."); § 4461(b) (referring to the "Amount of tax"); § 4461(c) (referring to "Liability and time of imposition of tax") (emphasis added). The assessment and collection provisions of the HMT are codified in the Internal Revenue Code, which is the source of the nation's tax laws. Moreover, the HMT was derived from the Water Resources Development Act of 1986,[6] and was included in that Act under Title XIV—Revenue Provisions. While this nomenclature is not dispositive of the nature of the assessment (U.S. Shoe, 907 F. Supp. at 411), the breadth and number of these references clearly cast doubt on the Government's claim that the HMT is not a revenue raising tax but merely a fee for port use.

The method of collection and the treatment of HMT funds, however, undoubtedly establishes that the HMT is a revenue-raising measure. HMT funds from exports are deposited in the Harbor Maintenance Trust Fund ("HMTF"). 26 U.S.C. § 9505. These funds are considered by the Federal Government to be "on budget" and, thus, are used by the federal government in calculating federal revenue and the federal budget deficit. As noted by the CIT, "any monies contributed by such [HMT] funds to the budget decreases the Treasury's need to borrow in order to finance the federal deficit." U.S. Shoe, 907 F. Supp. at 412, citing H.R. Rep. No. 251 pt. III, 99th Cong., 1st Sess. 19 (1985) ("[t]he increase in net budget receipts [provided by the Tax] will reduce the potential Federal budget deficit by a like amount

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6 Pub. L. No. 99-662, 100 Stat. 4082 (1986).

by providing a new source of user-related revenues rather than relying completely on general fund appropriations"). The Government claims that the statutory limits on the appropriations of such monies, for port and harbor maintenance only, prevents HMT funds from being a general revenue source and, thus a tax. But this attempt to magically convert what would clearly be tax revenue into something else, by the simple expedient of designating beforehand the use to which the taxes so collected will be put, cannot override the simple fact that the HMT funds provide a direct benefit to the general treasury of the United States.

Moreover, as discussed further in Section IV below, the surpluses that have accumulated year-after-year in the HMTF reveal the utter lack of a nexus between the tax paid by exporters and the expenditures of the funds for port maintenance. This pattern of surpluses negates any inference that the HMT is, in spite of its name, a user fee. As the CIT properly found, "the primary purpose of the Tax is to raise revenue, as Congress has imposed 'a duty under the pretext of fixing a fee.'" U.S. Shoe, 907 F. Supp. at 414.

III. THE HARBOR MAINTENANCE TAX IS A TAX ON EXPORTS

As established above, under the Court's reading of the Export Clause, if the HMT is a tax imposed upon U.S. exports it is unconstitutional. The HMT is an ad valorem tax equal to 0.125 percent of the value of the cargo to be exported. 26 U.S.C. § 4461(b). Thus, the tax is directly attached to the articles to be exported. In Department of Revenue of Wash. v. Association of Wash. Stevedoring Cos., 435

U.S. 734 (1978), the Supreme Court upheld a state business tax levied on the gross income of a stevedore's loading service as not violative of the Import-Export Clause. The basis for this conclusion was that the tax did not relate to the value of the goods, and therefore could not be considered taxation upon the goods themselves. Id. at 757. In contrast, the HMT is levied wholly on the value of the goods and therefore is a tax on the goods themselves.

Even assuming, arguendo, that the HMT is only a tax of "port use" rather than a tax on the exports themselves (which it is not), the HMT is still unconstitutional because it plainly places a significant burden on the course of exportation. This Court's strict enforcement of the Export Clause extends not only to "federal taxation of goods in export transit" but also to "certain services and activities closely related to the export process." IBM, 135 L. Ed. 2d at 133. For example, in Fairbank, supra, the Court found that a federal stamp tax applied to foreign bills of lading violated the Export Clause since, in substance and effect, it was a tax on the articles exported under the bill of lading. 181 U.S. at 293-94. While the tax at issue in Fairbank was not on the articles themselves but on the export documentation, the tax was found by the Court to violate the Export Clause since such documentation is "invariably associated with every cargo of merchandise exported to a foreign country . . . ." Id. at 294. The HMT is even more closely associated with the cargo to be exported than a bill of lading, since the tax is assessed directly against the value of the cargo to be exported. 26 U.S.C. § 4461(b). Moreover, the concept of "port usage" is itself inherently tied to the exportation process, as every

article leaving the United States by sea must in some way use a port.

In a number of cases, this Court has found certain taxes not levied directly upon the articles to be exported still to be in violation of the Export Clause's broad prohibition. See IBM, supra (tax on premiums paid to foreign insurance carriers); Hvoslef supra (tax levied against maritime charter parties involving the export of U.S. commodities); Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19 (1915) (tax on insurance policies applied to exports); A.G. Spalding & Bros. v. Edwards, 262 U.S. 66, 70 (1923) (federal sales tax imposed upon baseballs and bats to be exported). The taxes at issue in those cases, all of which violated the Export Clause, involved far less of a burden on the process of exportation than the HMT.

Furthermore, in Spalding, the Court discussed at which point the export process begins in evaluating the application of the Export Clause, and stated:

> So we return to the question that we have stated. To answer it with regard to any transaction we have to fix a point at which, in view of the purpose of the Constitution, the export must be said to begin . . . . In this case, for instance, while the goods were in the process of manufacture they were none the less subject to taxation if they were intended for export and made with specific reference to foreign wants. (citations omitted) On the other hand no one would doubt that

> they were exempt after they had been loaded upon the vessel for Venezuela and the bill of lading issued.

262 U.S. at 69 (emphasis added). In that case, title to the goods to be exported passed upon delivery to the carrier, and it was at that point the sales tax was incurred. The Court held that delivery of the goods to the carrier was clearly a point within the process of exportation. Spalding, 262 U.S. at 70 ("To put it at any later point would fail to give to exports the liberal protection that hitherto they have received . . . .").

In the case of the HMT, liability is imposed "in the case of cargo to be exported from the United States, at the time of loading . . . ." 26 U.S.C. § 4461(c)(2)(A). Moreover, "port use" to which the HMT applies is defined as "the loading of commercial cargo on . . . a commercial vessel at a port." 26 U.S.C. § 4462(a)(1)(A). Under the test set forth in Spalding, the HMT plainly is encompassed within the exportation process. The Government's assertion that the HMT merely regulates port usage is irrelevant since such regulation is impermissible if it is accomplished by way of an unlawful taxation of exports. United States Shoe Corp. v. United States, 114 F.3d 1564, 1575 (Fed. Cir. 1997) ("the power to regulate commerce cannot completely override the effect of the Export Clause.").

Thus, whether the HMT is a direct assessment on U.S. export articles or an indirect assessment based upon "port use," the HMT is an unlawful tax on exports that is contrary to the Constitution. As the CIT correctly found, "Congress could not have imposed the Tax any closer to exportation, or more

immediate to the articles exported." U.S. Shoe, 907 F. Supp. at 418. As the HMT offends both the letter and spirit of the Export Clause, the decision of the Court of Appeals should be affirmed.

IV. THE HARBOR MAINTENANCE TAX IS NOT A USER FEE

The Government attempts to escape the conclusion compelled by the words of the Export Clause, its history, and this Court's pronouncements by arguing that the Harbor Maintenance Tax is not a tax, but a user fee, under the standards set forth by this Court in Evansville-Vanderburgh Airport Auth. Dist. v. Delta Airlines, Inc., 405 U.S. 707 (1972) ("Evansville") and that case's refinement in Massachusetts v. United States, 435 U.S. 444 (1978) ("Massachusetts"); cases that did not even involve the Export Clause. To constitute a "user fee" under the rule in Evansville/Massachusetts, the HMT must:

> (1) not be applied in a discriminatory fashion;
>
> (2) must be reasonably related to an exporter's use of a port; and,
>
> (3) must not recoup moneys in excess of benefits conferred.

Massachusetts, 435 U.S. at 466. It should be noted that if the HMT fails any one prong of the Evansville/Massachusetts test, it is a tax, and therefore runs afoul of the Export Clause. In this case, the HMT fails at least the second and third

prongs of the Evansville/Massachusetts test, and must therefore fall.

A. The HMT Is Not Based Upon a Fair Approximation of the Cost of Benefits Supplied

Under the second element of the rule in Evansville/Massachusetts, an assessment fails as a user fee if there is no reasonable parity between the exporter's liability to pay the HMT and the benefit the exporter receives from the HMT program. The Court requires that a "user fee be a 'fair approximation of the cost of benefits supplied.'" United States v. Sperry Corp., 493 U.S. 52, 60 (1989) (quoting Massachusetts v. United States, 435 U.S. 444, 463 n.19). See also Hager v. City of West Peoria, 84 F.3d 865, 871 (7th Cir. 1996).

Proof of the HMT's violation of the "fair approximation" rule is underscored by three characteristics of the HMT: (1) it is assessed on the value of the articles exported, not their weight, density or other transportation characteristics; (2) it is not applied against all users, as a user fee would contemplate, but rather only against the shipper; and, (3) unlike a user fee, there is a serious mismatch between the benefits and the liability as to the port actually used.

1. The HMT is assessed on the value of goods, rather than properties that reflect the cost of the benefits supplied.

For those who do incur the HMT tax liability, the amount of the tax is, in many cases, directly at

odds with the impact a particular use has on port facilities. This peculiarly unfair relationship stems from the fact that the HMT is imposed on an ad valorem basis, rather than on a tonnage or similar basis. 26 U.S.C. § 4461(b). In choosing an ad valorem assessment, Congress placed a heavier burden on export articles that are light in weight and high in value: an exporter of light, high-valued articles will incur a greater HMT liability than a shipper of heavy-loading bulk products. But the need for and cost of harbor maintenance has no rational relationship whatsoever to the value of articles exported, but rather to the quantity and tonnage of goods swung over the quay and carrier draft through the channel. Indeed, the cost of maintaining harbor facilities is usually greater for heavy-loading bulk products, which perversely pay a smaller percentage of the total monies collected under the HMT, compared to high-value, light loading products. The existence of this high weight/low value windfall shows that no reasonably fair correlation exists between the tax liability and the benefit derived.

2. The HMT is assessed against only one of the users and beneficiaries of the tax rather than all who use the harbor facilities and receive the benefits supplied

The relationship between HMT liability and benefit is also unbalanced in another way, since it is assessed solely against the exporter, and not upon the owner of the ship that directly uses the port facility. The Government argues that exporters and other shippers are the "direct beneficiaries" of the HMT. But the facilities improved by HMT funds surely

benefit the shipper and exporter no more than they benefit the carrier that owns the vessels directly using the port, or the port itself. Yet, only the shipper and exporter pay the tax, and neither the carriers nor the ports have HMT liability. See S. Rep. No. 126, 99th Cong. 2d Sess. 7, 9 (1986), reprinted in 1986 U.S.C.C.A.N. 6639, 6644, 6647 ("The tax in title 8 is not on the harbor, nor is it on the vessel's operator or owner.").

In its Brief, the Government argues that taxes are allocated by economics, not by statutes, and therefore it is immaterial whether the HMT is levied against the shipper, the vessel owner, or some other person. But this assertion, which finds no support in the record, is not necessarily true. The Government's assertion is based upon the unproven assumption that the shipper, who is the person in the export chain against whom the HMT is levied, can readily force the tax to be passed up or down to other members of the chain, and that therefore the identity of the direct payee of the tax is immaterial. But the ability to "pass through" an assessment is not always (or even often) friction-free, and there may—or may not—be market mechanisms to force the payment of the tax up as well as down the chain. The American shipper, who is one of the last parties in this particular supply chain, in fact generally has a single choice: to swallow the cost of the tax and cut his margins.

3. The HMT bears no relationship to the benefits received by a particular port that is used by the user

At the time of passage, Senator George Mitchell (D-Maine) stated that "Portland, Maine requires an annual average of approximately $290,000 for port maintenance. The ad valorem tax on cargo entering Portland would raise over $1 million dollars." S. Rep. No. 126, 99th Cong., 2d Sess. (1986) (Additional Views of Senator Mitchell), reprinted in 1986 U.S.C.C.A.N. at 6704; see also Army Corps of Engineers, Briefing Book and Fact Sheets on the Harbor Maintenance Fee [sic] and Trust Fund at 1 (Feb. 14, 1990). Senator Mitchell's observations illuminate another aspect of the absence of a "reasonably fair" approximation between liability and benefit with respect to the HMT: the utter lack of connection between the cost of maintaining a particular harbor and the tax assessed on goods going through that harbor. Shippers and exporters using port facilities harbored within rocky shores and accessed through naturally deep channels receive less in benefits than a shipper utilizing fledgling or neglected port facilities constructed within a tidewater, amidst shallow sands and tidal marshes.

This is not to say that "fair approximation" would require, as the Government argues, separate fees and trust funds for each port; some categorization would clearly be permissible. But the Government cannot ignore the complete mismatch between the burden of the HMT and the benefits supplied by arguing that nationwide port services are available if needed. See Gov't Br., p. 29. Such an

interpretation of the Evansville/Massachusetts test would render every challenged nationwide "tax" on exports a permissible "user fee," as long as it was earmarked for some transportation purpose, and would effectively eliminate the third prong of the test altogether. The Government is required to show that the Congress rationally attempted to link liability and benefit, a linkage that was not and cannot be made here.

B. The Revenue Collected Under the HMT Is Far In Excess of the Cost of Maintaining American Ports and Harbors.

Having failed the second of the three elements required under this Court's decisions in Evansville/Massachusetts to categorize an assessment as a "user fee" and not a "tax," the HMT fails the third element as well. In order to pass the third prong of the rule, a system of assessment must collect revenues that are roughly equal to the amount spent in furtherance of the use for which the government is seeking compensation. If a system of assessment functions as a "goose-that-lays-the-golden-egg," then the Court categorizes the proceeds from that system of assessment as taxes, not user fees. Massachusetts, 435 U.S. at 466-67.

Since its imposition in 1986, the HMTF has amassed a huge surplus. By the end of fiscal year 1992, the cumulative surplus in the HMTF had already reached $120.9 million. First Annual Report on the Status of the Harbor Maintenance Trust Fund at 6. Deposits into the HMTF during fiscal year 1994 totaled $646.2 million, whereas expenditures during the same accounting period equaled only $487.6

million. Third Annual Report at 1-2. This yielded a surplus of $158.6 million, or 25% of the total tax levied. Indeed, as the following chart shows, HMT revenues have exceeded expenditures in every single year of the tax's existence, and the surplus in fiscal year 1998 alone is expected to be half again as much as the amount collected. By the end of fiscal year 1999, the total accumulated surplus is expected to be over three times the amount of annual expenditures. Third Annual Report at 6.

A fund surplus of this magnitude is more than a reserve, and cannot be rationally argued to be needed for fluctuations in expenditures over time. The HMTF is simply a depository for collections used to offset the federal deficit.

HMT Surplus Imbalance				
Year	**Revenues, Expenditures and Yearly and Cumulative Surplus** (millions of dollars)[1]			
FY	**(A)**	**(B)**	**(C)**	**(D)**
	Revenues[2]	Expenditures[2]	FY Surplus[3]	Cumulative Surplus[4]
1987	53.2	39.0	14.2	15.2
1988	161.0	157.6	3.4	9.7
1989	183.1	169.6	13.5	12.3
1990	197.6	170.6	27.0	30.3
1991[5]	395.5	342.7	52.8	72.8
1992	531.1	473.4	57.7	120.9
1993	650.7	460.0	190.7	303.3
1994	646.2	487.6	158.6	452.4
1995	665.3	472.4	192.9	645.2
1996	717.5	558.9	158.6	558.9
1997	771.2	543.9	227.3	1,031.2
1998	822.5	533.9	288.6	1,319.8
1999	864.0	523.9	340.1	1,659.9

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1 All figures rounded off to the nearest $100,000; Saint Lawrence Seaway Tolls omitted.

2 The 1987 figures are taken from First Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund (FY 1987-1992); J.A. at 50 ("Revenues & Transfers"); the 1988 figures are from Second Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund (FY 1993); J.A. at 67 ("Revenues & Transfers", undated); and all figures from 1989 through to the projections from 1995 to 1999 are taken from Third Annual Report to Congress on the Status of the Harbor Maintenance Trust Fund (FY 1994); J.A. at 103-104 ("Revenues & Transfers", undated).

3 Column (B) subtracted from Column (A).

4 Same as note 2. The U.S. Government's reported Cumulative Surplus is higher than a straight-line computation of the successive fiscal year surpluses added together.

5 Section 11214 of the Omnibus Budget Reconciliation Act of 1990, Pub.L. No. 101-508, 104 Stat. 1388-436, raised the HMT from a 0.04 to 0.125 percent ad valorem rate.

CONCLUSION

The decision of the Court of Appeals for the Federal Circuit should be affirmed.

Respectfully submitted,

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